No. 01-1120-CFX

Title: David Meyer, Individually and in His Capacity as President and Designated Officer/Broker of Triad, Inc., etc., Petitioner
v.
Emma Mary Ellen Holley, et vir, et al.

Docketed:
February 1, 2002

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Dec 7 2001	Application (01A435) to extend the time to file a petition for a writ of certiorari from December 18, 2001 to February 1, 2002, submitted to Justice O'Connor.
	Dec 10 2001	Application (01A435) granted by Justice O'Connor extending the time to file until February 1, 2002.
	Jan 28 2002	Petition for writ of certiorari filed. (Response due April 8, 2002)
	Feb 11 2002	Order extending time to file response to petition until April 8, 2002.
	Mar 25 2002	Brief amicus curiae of California Association of Realtors filed.
	Apr 8 2002	Brief of respondents Emma Mary Ellen Holley, et al. in opposition filed.
	Apr 8 2002	Brief amicus curiae of National Association of Realtors filed.
	Apr 23 2002	DISTRIBUTED for Conference of May 9, 2002
	Apr 24 2002	Reply brief of petitioner David Meyer filed.
	May 13 2002	REDISTRIBUTED for Conference of May 16, 2002
	May 20 2002	Petition GRANTED. SET FOR ARGUMENT December 3, 2002. **********
	Jun 21 2002	Order extending time to file the joint appendix and petitioners' brief on the merits to and including August 2, 2002.
	Aug 1 2002	Brief amicus curiae of California Association of Realtors filed.
	Aug 2 2002	Joint appendix filed.
	Aug 2 2002	Brief of petitioner David Meyer filed.
	Aug 2 2002	Brief amicus curiae of National Association of Realtors filed.
	Aug 2 2002	Brief amicus curiae of National Association of Home Builders filed.
	Aug 8 2002	Order extending time to file respondents' brief on the merits to and including September 27, 2002.
	Aug 28 2002	Record filed.
	Sep 9 2002	Brief amicus curiae of United States filed.
	Sep 27 2002	Brief of respondents Emma Mary Holley, et al. filed.
	Sep 27 2002	Brief amicus curiae of International Association of Official Human Rights Agencies filed.
	Sep 27 2002	Brief amici curiae of National Fair Housing Alliance and AARP filed.
	Oct 1 2002	LODGING consisting of twenty sets of two documents received from counsel for the respondents.
	Oct 10 2002	Motion of the Solicitor General for leave to participate

2 pp

No. 01-1120-CFX

Entry	Date	Proceedings and Orders
		in oral argument as amicus curiae and for divided argument filed.
	Oct 21 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 25 2002	Record filed.
	Oct 30 2002	Reply brief of petitioner David Meyer filed.
	Nov 7 2002	CIRCULATED.
	Dec 3 2002	ARGUED.

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

BROWN & PEEL
JAMES W. PEEL
3585 West Beechwood
Suite 101
Fresno, California 93711
(559) 431-1300

BENEDON & SERLIN
DOUGLAS G. BENEDON*
GERALD M. SERLIN
21700 Oxnard Street
Suite 1290
Woodland Hills, California 91367
(818) 340-1950
*Counsel of Record

Attorneys for Petitioner
David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Under well-established rules of agency law, an owner or corporate officer will not be held vicariously liable for the torts of his corporation or its other agents, merely by virtue of his office. Rather, liability must be founded upon the owner's or officer's own specific acts.

The question presented here is whether, as held by the Ninth Circuit, the criteria under the Fair Housing Act (42 U.S.C. § 3601, *et seq.*) are different, so that owners and officers of corporations are absolutely liable for an employee's or agent's violation of the Act, whether or not they personally directed, authorized, or were even aware of the particular acts that occurred.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this proceeding are petitioner David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors, and respondents Emma Mary Ellen Holley; David Holley; Michael Holley, a minor; Brooks Bauer, individually and on behalf of the general public.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Meyer, individually, and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors ("petitioner"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case filed on July 31, 2001.

OPINION BELOW

The district court's orders granting in part petitioner's motion to dismiss and granting petitioner's motion for summary judgment are not published. These unpublished orders are reprinted in the Appendix to this Petition at pages 17-36. The court of appeals' opinion (per Hug, J., joined by Fletcher and Illston, JJ.) reversing is published at 258 F.3d 1127 (9th Cir. 2001), and is reprinted in the Appendix at pages 1-16. The court of appeals' orders denying rehearing and rehearing en banc and staying mandate are set forth in the Appendix. Appendix at 37-40.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on July 31, 2001. A petition for rehearing and rehearing en banc was timely filed, and denied on September 19, 2001. Justice O'Connor subsequently extended the time to file this petition to and including February 1, 2002.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

1. The Fair Housing Act of 1968 (FHA), 42 U.S.C. § 3601, *et seq.* The relevant provisions of this statute – §§ 3610, 3612, and 3613 – are reprinted in the Appendix at 41-61.

2. Former 24 C.F.R. § 103.10-20 (1999). Appendix at 62-63.

3. Current 24 C.F.R. § 103.10-20 (2000). Appendix at 64.

STATEMENT OF THE CASE[1]

Respondent Emma Mary Ellen Holley is African-American, her husband Respondent David Holley, is Caucasian, and their son, Respondent Michael Holley is African-American. According to the allegations of their complaint, in October 1996, the Holleys visited Triad Realty's office in Twenty-Nine Palms, California where they met with Triad agent Grove Crank and inquired about listings for new houses in the range of $100,000 to

[1] This appeal arose following the granting in part of Meyer's motion to dismiss. Appendix at 17-28. For the purpose of reviewing a motion to dismiss, the properly pled factual allegations of the plaintiff's complaint are presumed to be true. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

$150,000. The Holleys alleged that Crank showed them four houses in the area, all priced above $150,000.

In mid-November 1996, the Holleys located a home on their own that happened to be listed by Triad. In response to the Holleys' inquiry about the home, Triad agent Terry Stump informed them that the asking price for the house was $145,000. The Holleys expressed interest in purchasing the home and offered to pay the asking price and to put $5,000 in escrow for the builder to hold the house until April or May 1997 when they were to close escrow on the sale of their current home.

Stump allegedly told the Holleys that their offer seemed fair, as did the builder, Respondent Brooks Bauer, when Mrs. Holley called him with the same offer. Bauer did advise, however, that the offer would have to go through Triad. Later, Stump allegedly called Mrs. Holley to tell her that more experienced agents in Triad's office, one of whom was later identified as Crank, felt that $5,000 was insufficient to get the builder to hold the house for six months. The Holleys decided not to raise their offer and Triad never presented the original offer to Bauer. One week later, Bauer inquired at Triad about the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys, telling Bauer that he did not want to deal with those "n" and called them a "salt and pepper team." The Holleys eventually hired a builder to construct a house for them and Bauer later sold his house for approximately $20,000 less than the Holleys had offered.

Bauer and the Holleys filed a complaint on November 14, 1997, alleging that Crank and Triad violated federal and state fair housing laws. They later filed a separate action against Petitioner David Meyer as officer/broker, president and owner of Triad, covering the same allegations and adding several new claims. The district court consolidated the two cases.

The district judge, ruling on a Federal Rule of Civil Procedure 12(b)(6) motion, dismissed all of the claims except the FHA claim, on the grounds that they were barred by the applicable statutes of limitation. Respondents did not appeal this ruling. With regard to the FHA claim, the district court granted the motion to dismiss Meyer in his capacity as an officer of Triad stating that any such liability would attach to Triad in that Respondents had not urged theories that would justify reaching Meyer individually.

Meyer then moved for summary judgment on the FHA claim. The district court granted Meyer summary judgment on that claim, finding that, during the relevant time, the real estate license was issued to Triad, with Meyer as the designated corporate officer of Triad. Thus, the district court concluded that Crank's alleged discriminatory acts could be imputed to Triad, but not to Meyer as an individual. The district court entered a rule 54(b) certification of that judgment as final to allow this appeal, and stayed all remaining proceedings against Triad and Crank.

The court of appeals reversed. The court held that Meyer could be held vicariously liable for Crank's conduct based on his status as the purported owner and

president of Triad, and as the corporation's designated officer/broker. Appendix at 1-16. The court of appeals denied Meyer's petition for rehearing and rehearing en banc. Appendix at 39-40. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

In its published decision, the Court of Appeals for the Ninth Circuit held that the owners and officers of corporations may be vicariously liable for an employee's violation of the Fair Housing Act (42 U.S.C. § 3601, *et seq.*; "FHA"), whether or not they directed, authorized, or even were aware of the particular acts that occurred. While acknowledging that under general rules of tort law, corporate shareholders and officers usually are not held vicariously liable for an employee's action, the court of appeals held that the criteria under the FHA are different, with liability adhering to "those who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling." 258 F.3d 1129.

Certiorari should be granted because this case presents an issue to which Sup.Ct.R. 10(c) applies, i.e., the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, namely whether the FHA abrogates established rules of vicarious liability. The court of appeals' conclusion that it does is premised on an erroneous application of the law, which conflicts with other circuits.

First, the court of appeals' decision incorrectly relies on the text of a regulation of the Department of Housing and Urban Development ("HUD") because that regulation had been superceded by new text, and also because that regulation concerns the investigation and conciliation of administrative complaints, rather than private civil litigation. 258 F.3d at 1130-31. That regulation provided, in part, that a "complaint" may be filed against any person who "has the right to direct or control the conduct of another person" with respect to any aspect of the sale of dwellings. Former 24 C.F.R. § 103.20 (1999); Appendix at 63. The court of appeals' elevation of an administrative regulation – which no longer existed at the time the court of appeals relied upon it – to the level of controlling law was error.

The text of Section 103.20, in the form relied on by the court of appeals, had already been rewritten, and no longer makes any reference to claims against persons with the right to direct or control. The current regulation existing at the time the court of appeal issued its opinion merely states that individuals can notify HUD if they believe there has been discrimination against them in any activity related to housing. 24 C.F.R. § 103.10-20 (2000); Appendix at 63-64. Thus, the authority upon which the court of appeals relied effectively created new law by fiat.

Moreover, the court of appeals' decision fails to address, and directly conflicts with, authority from other circuits holding that HUD regulations do *not* cover the circumstances of the present case, which is a private cause of action and not a complaint filed with HUD. See, *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992). Finally, even if this Court were to look to HUD's administrative

regulations for guidance, nothing in the language of the regulations supports a conclusion that ordinary principles of agency are to be displaced in favor of absolute liability. *Id.*, at 905-06.

Second, the court of appeals relied on case law from the Ninth Circuit and other circuits holding that the duty not to discriminate is "nondelegable." 258 F.3d at 1131-32; see, *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir. 1980) (action under 42 U.S.C. § 1982); *Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974). The court of appeals misapplied this legal principle. The nondelegable duty not to discriminate does not change the law of vicarious liability. The court of appeals' decision fails to address the authority from other circuits on point, which has expressly held that vicarious liability for an agent's violation of the FHA attaches to the corporation under whose broker's license the agent was operating. No liability attaches to the officers of the corporation, unless the officer personally participated in the agent's acts, or knew of and ratified his acts and statements, and the nondelegation principle simply does not apply to hold otherwise. See, e.g., *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232 (N.D. Ohio 1983); *United States v. Lorantffy Care Center*, 999 F.Supp. 1037 (N.D. Ohio 1998). In the present case, there is no allegation or evidence Meyer participated in, or knew of and ratified, the alleged discriminatory acts of the corporation's agent, Crank. Rather, in contravention of the authority in other circuits, the court of appeals held Meyer could be personally liable based solely on his status as the owner or officer of the corporation.

Third, the court of appeals believed its expansion of liability was warranted by the policy underlying the FHA to provide a remedy to those who are the victims of discrimination. 258 F.3d at 1132-33; see, *Walker v. Crigler*, *supra*, 976 F.2d at 904. The court of appeals' belief is not well-founded. The plaintiffs in this action are not without a remedy against the agent who allegedly violated the FHA, as well as his principal, the corporation. No further purpose is served by allowing plaintiffs to proceed personally against an innocent officer of the corporation who neither participated in, nor authorized or ratified, the agent's conduct. Such a quest for an imagined "deep pocket" is repugnant to, and in no way furthers, the actual and laudable policy underlying the FHA.

Fourth, review of the court of appeals' decision is necessary and appropriate due to the exceptional impact of this case. The court of appeals' published opinion has already attracted the attention of state and national media, demonstrating recognition that the ramifications of the decision extend far beyond the catastrophic consequences to Meyer. By holding that the officer of a corporation can be absolutely liable for the conduct of the corporation's agent, whether or not the officer directed, or authorized or knew of the particular discriminatory act, the court of appeals' decision has, without exaggeration, opened the floodgates of litigation throughout the country. Such a holding warrants further scrutiny before becoming the law.

LEGAL DISCUSSION

I.

THE COURT OF APPEALS IMPROPERLY RELIED ON AN ADMINISTRATIVE REGULATION THAT IS INAPPLICABLE IN THE CONTEXT OF THIS CASE.

In reaching its conclusion that the criteria for liability under the FHA are different than under general principles of tort law, the court of appeals did not rely on the FHA itself, which neither defines – nor expands – the class of persons who can be sued for alleged discriminatory housing practices. Rather, the court of appeals relied on HUD regulations for the investigation and conciliation of administrative complaints. Specifically, the court of appeals relied on *former* 24 C.F.R. section 103.20(b) (1999) which provided, in relevant part:

> "A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale . . . of dwellings or the provision of brokerage services relating to the sale . . . of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, or is about to engage, in a discriminatory housing practice." Appendix at 63.

Section 103.20, however, is no longer in effect. The regulation was replaced and completely rewritten prior to the court of appeals' decision to read in relevant part:

> **"What can I do if I believe someone is discriminating against me in the sale, rental, finance, or advertisement of housing?**

> You can notify HUD if you believe there has been discrimination against you in any activity related to housing because of race, color, religion, national origin, sex, disability, or the presence of children under the age of 18 in a household." 24 C.F.R. § 103.10 (2000), original bold; see also, 24 C.F.R. §§ 103.15-20. Appendix at 64.

The court of appeals acknowledged this change in HUD regulations, but summarily dismissed it as merely making the provision more "user-friendly." 258 F.3d at 1131, fn. 1. That, however, is not what HUD did. The new regulations completely abolished any reference to liability of "any person" with "the right to direct or control the conduct of another person" with respect to housing, and in so doing eliminated the very language relied on by the court of appeals to support its decision. HUD's elimination of this language from the regulations cannot be summarily dismissed as merely an attempt to make the regulations "user-friendly."

Second, even if this Court were to look to the former HUD regulation for guidance, the court of appeals' elevation of the regulations to the level of controlling law was improper. HUD regulations expressly apply only to administrative complaints. They do not cover civil actions, nor purport to expand civil liability. 24 C.F.R. § 103.1.[2] The court of appeals' decision fails to address

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[2] Former 24 C.F.R. section 103.1 provided in relevant part:

> "(a) This part contains the procedures established by the Department of Housing and Urban Development for the investigation and conciliation of complaints under section 810 of the Fair Housing Act, 42 U.S.C. § 3610."

and directly conflicts with the authority from other circuits, which has expressly held that these regulations "do not cover the circumstances of the present case which is a private cause of action and not a complaint filed with HUD." *Walker v. Crigler, supra,* 976 F.2d at 904 (interpreting former Section 103.20).

Third, the court of appeals overlooked the history of the promulgation of former Section 103.20, which demonstrates that HUD in no way intended to impose strict vicarious liability upon innocent owners and corporate officers. See, *Walker v. Crigler, supra,* 976 F.2d at 905-06 (HUD "has made clear that ordinary principles of agency law are not to be displaced in favor of strict liability"). HUD first addressed the issue in 1984, when it published a proposed section entitled "Persons against whom complaints may be filed." Subdivision (b) of this proposed section was substantially identical to the language subsequently used in Section 103.20, *except* that it omitted the requirement that the agent be acting in the scope of employment. 49 Fed. Reg. 40533 (proposed Oct. 16, 1984); see, *Walker v. Crigler, supra,* 976 F.2d at 906.

In response to concerns that the regulation could be interpreted as imposing strict liability on owners and corporate officers for the unlawful acts of their agents, HUD's comments accompanying the publication of the final version of the rule – which was the version relied on by the court of appeals – makes clear this was not HUD's intent. According to HUD,

> "NAR [National Association of Realtors®] contended that the judicial decisions do not establish a rule of absolute liability (without fault) as paragraph (b) would impose. NAR argued that

> the decided cases focus only on the liability of a broker for conduct of his or her salespersons, but do not mandate absolute liability on the basis of mere right 'to direct or control' without reference to instructions, policies, compliance programs and other actions of the principal. . . . In response, ***it is not HUD's intent to impose absolute liability on any principal***; the intent, in proposing paragraph (b), was to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to liability of a principal for acts of an agent. . . . " *Walker v. Crigler, supra*, 976 F.2d at 907, citing 53 Fed. Reg. 24185 (1988), added emphasis; see also, 54 Fed. Reg. 3260-61 (1989).

Thus, HUD's comments confirm the most straightforward reading of the text of former Section 103.20: established principles of agency law, and not strict liability, control a principal's liability under the FHA for the acts of an agent. See, *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992) (principals may be held liable for the conduct of their agents in violation of the FHA under established rules of agency).

II.

THE COURT OF APPEALS MISAPPLIED THE PRINCIPLE OF "NONDELEGABLE" DUTY BY HOLDING IT SUPERCEDES ESTABLISHED RULES OF AGENCY LAW.

Under well-established rules of agency law, a corporate officer will not be held vicariously liable, merely by virtue of his office, for the torts of his corporation or its other agents. Rather, liability must be founded upon specific acts by the individual officer. See, *Lobato v. Pay-*

Less Drug Stores, 261 F.2d 406, 409 (10th Cir. 1958); *Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 1141, 1144 (4th Cir. 1975); *Escudo Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980); *Murphy Tugboat v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 852 (N.D. Cal. 1979), aff'd, 658 F.2d 1256, 1263 (9th Cir. 1981); see also, 18B Am.Jur.2d, Corporations, §§ 1877-78.

This fundamental principle of agency and corporation law has been applied regularly to claims brought under the FHA, and those courts which have expressly considered the issue in this context have underscored the need for the officer's personal participation in torts committed by the corporation or its agents in order for liability to be imposed on the owner or officer. *Tillman v. Wheaton-Haven Recreation Ass'n., supra*, 517 F.2d at 1144; *United States v. Lorantffy Care Center, supra*, 999 F.Supp. at 1045; *Heights Community Congress v. Hilltop Realty, Inc., supra*, 629 F.Supp. at 1303-04.

The court of appeals' decision overlooked this authority. Instead, the court of appeals relied on authority from the Ninth Circuit and other circuits that the duty not to discriminate is "nondelegable." The court of appeals concluded this principle of law was sufficient to override established agency law, and impose vicarious liability on corporate owners and officers for a sales agent's violation of the FHA, whether or not the owners or officers directed, authorized, ratified, or even knew of the particular acts that occurred. The court of appeals has misapplied the law in a fundamentally significant manner that requires correction by this Court.

The court of appeals relied extensively on *Phiffer v. Proud Parrot Motor Hotel, Inc., supra,* 648 F.2d at 548. *Phiffer* was a case under 42 U.S.C. section 1982, not the FHA, based on a rental agent's alleged discriminatory refusal to rent office space in a commercial hotel.[3] 648 F.2d at 550-51. The Ninth Circuit found the discriminatory conduct of the rental agent was imputable to the owner of the commercial hotel under the nondelegable duty not to discriminate. "Discriminatory conduct on the part of a rental agent is, however, attributable to the owner of a motel, apartment complex, or other public housing facility. [Citations.] The duty of the owner of such a facility to obey the laws relating to racial discrimination is non-delegable." *Id.*, at 551.

It is, however, important to note that in reaching its conclusion to affirm, the Ninth Circuit pointed out that "the magistrate found that the desk clerk's actions reflected the established policy of the Proud Parrot." 648 F.2d at 551. Thus, the owner affirmatively participated in the discriminatory conduct of its agents by establishing a discriminatory policy for the business. Accordingly, nothing in the facts or holding of *Phiffer* supports the court of

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[3] To the extent *Phiffer* can be read as expanding liability under Section 1982 on the basis of a nondelegable duty, it is in direct conflict with the law in the Fourth Circuit. See, *Tillman v. Wheaton-Haven Recreation Association, Inc., supra,* 517 F.2d at 1144 ("[Section] 1982 should be interpreted as neither enlarging nor diminishing the liability of directors under general corporation law for tortious acts performed nominally by the corporation").

appeals' conclusion here that, under the principle of nondelegable duty, the officer of a corporation can be vicariously liable under the FHA for the acts of an agent, whether or not the officer directed or authorized the acts which occurred.

Thus, while there is a nondelegable duty not to discriminate, that principle applies to preclude a principal to whom a legal duty applies (here, the duty not to discriminate) from attempting to evade that duty when an agent, rather than the principal, performs conduct to which the law applies. That principle does not apply to the quite distinct question of whether corporate officers or owners to whom the FHA does not by its terms apply at all are liable for the misconduct of the corporation and its agents. Nondelegation does not transform a determination of an owner's or officer's liability from established rules of agency to strict liability. Indeed, in distinct contrast to the holding of the court of appeals here, the proper limit of the nondelegable duty concept was expressly recognized by the court in *Hilltop,* where on that basis the court found *only the corporation* liable for the discriminatory acts and statements of its agents. 629 F.Supp. at 211-13 ("A broker under contract with its agents has a nondelegable duty to obey the Fair Housing Act. [Citation.] Thus, Hilltop Realty is liable for the imputed acts and statements of those agents who participated in the [violations of the FHA]").

In sum, while there is a nondelegable duty not to discriminate, the court of appeals misapplied that principle by holding it superseded established rules of agency law.

III.

THE COURT OF APPEALS' EXPANSION OF LIABILITY IS NOT WARRANTED BY THE POLICY UNDERLYING THE FHA TO PREVENT DISCRIMINATION IN HOUSING.

The declared policy of the FHA is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The Fourth Circuit elaborated on this policy as follows:

> "The central question to be decided in a case such as this . . . is which innocent party, the owner whose agent acted contrary to instruction, or the potential renter who felt the direct harm of the agent's discriminatory failure to offer the residence for rent, will ultimately bear the burden of the harm caused. It is clear that the overriding societal priority of the provision 'fair housing throughout the United States' clearly set out in the Fair Housing Act, indicates that the one innocent party with the power to control the acts of the agent, the owner of the property or other responsible superior, must act to compensate the injured party for the harm, and to ensure that similar harm will not occur in the future." *Walker v. Crigler, supra*, 976 F.2d at 904-05; accord, *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096-97 (7th Cir. 1992).

The court of appeals seized on this language as providing the policy justification for its holding that the owners and officers of corporations may be vicariously liable for an employee's violation of the FHA, whether or not the owners or officers directed or authorized the

particular acts that occurred. 258 F.3d at 1131-32. It does not.

The plaintiffs in this action are not without recourse. They can pursue their action against the agent who is directly responsible for the alleged discrimination, as well as against the "one innocent party with the power to control the acts of the agent," i.e., the corporation. No legitimate policy is furthered by allowing plaintiffs to pursue an innocent corporate officer/owner as well. Indeed, plaintiffs' motivation for pursuing this case against Meyer is transparent. Plaintiffs apparently believe that, because the corporation's insurance policy excludes coverage for discrimination claims, they have been left without a remedy. Plaintiffs' contention that they should be allowed to proceed against Meyer because he is an imagined "deep pocket" is repugnant, and in no way furthers the actual laudable policy underlying the FHA.

IV.

THE ISSUE PRESENTED BY THIS CASE IS OF NATIONAL IMPORTANCE.

Review by this Court of the court of appeals' decision is necessary and appropriate due to the exceptional importance of this case. The court of appeals' decision has already attracted the attention of state and national media, as well as the California and National Associations of Realtors®, demonstrating that the ramifications of the decision extend far beyond the catastrophic consequences to Meyer.

While this case involves a small real estate company in a small desert town with perhaps five sales agents, the

same corporate structure governs many real estate firms, from tiny "Mom and Pop" operations to corporate real estate giants that may hire thousands of agents nationwide. Now, under the court of appeals' decision, each owner and officer of these corporations is going to be *personally* liable for the acts of all of those agents. What sane individual would take on that responsibility? Yet without officers and owners, none of these real estate corporations could continue to function. Indeed, the impact of the court of appeals' decision goes beyond the real estate industry, encompassing as it does the officers of *any* corporation providing services related to the purchase and sale of residential real estate.

By holding a corporate owner or officer personally liable for the conduct of the corporation's agent, whether or not the individual directed or authorized the particular discriminatory act, the court of appeals' decision has, without exaggeration, opened the floodgates of litigation throughout the country. Such a holding warrants further scrutiny by this Court before becoming the law of the nation.

CONCLUSION

For the foregoing reasons, Petitioner prays for a writ of certiorari to issue to the Court of Appeals for the Ninth Circuit.

Dated: January 28, 2002

Respectfully submitted,

BROWN & PEEL
JAMES W. PEEL
BENEDON & SERLIN
DOUGLAS G. BENEDON
GERALD M. SERLIN

Attorneys for Petitioner, David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors.

United States Court of Appeals,
Ninth Circuit.

Emma Mary Ellen HOLLEY; David Holley; Michael Holley, a minor; Brooks Bauer, individually and on behalf of the general public, Plaintiffs-Appellants,

v.

Grove S. CRANK, Sr., individually, dba Triad Realtors; Triad Inc., individually, dba Triad Realtors Defendants,

and

David Meyer, individually and in his capacity as President and designated officer/broker of Triad, Inc., dba Triad Realtors, Defendant-Appellee.

No. 99-56611.

Argued and Submitted March 5, 2001
Filed July 31, 2001

Elizabeth N. Brancart, Brancart & Brancart, Pescadero, California, for the appellants.

Douglas G. Benedon, Benedon & Serlin, Woodland Hills, California, for the appellee.

Appeal from the United States District Court for the Central District of California; William Matthew Byrne, Jr., Senior District Judge, Presiding. D.C. Nos. CV-98-07965-WMB-HX, CV-97-08369-WMB-SHX.

Before: HUG, AND B. FLETCHER, CIRCUIT JUDGES, and ILLSTON, District Judge.*

HUG, Circuit Judge:

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* Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

In this case we must decide whether owners and officers of corporations may be held vicariously liable for an employee's violations of the Fair Housing Act (FHA). We conclude that they can. Although under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the Fair Housing Act is different as liability is specified for those who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling. The decision of the district court is reversed.

BACKGROUND

Emma Mary Ellen Holley is African American, her husband David Holley, is Caucasian and their son, Michael Holley is African American. The Holleys allege that in October 1996, they visited Triad Realty's office in Twenty-Nine Palms, California where they met with Triad agent Grove Crank and inquired about listings for new houses in the range of $100,000 to $150,000. The Holleys allege that Crank showed them four houses in the area, all above $150,000. In mid-November 1996, the Holleys located a home on their own that happened to be listed by Triad. In response to the Holleys' inquiry about the home, Triad agent Terry Stump informed them that the asking price for the house was $145,000. The Holleys expressed interest in purchasing the home and offered to pay the asking price and to put $5,000 in escrow for the builder to hold the house until April or May 1997 when they closed escrow on their existing home.

Stump told the Holleys that their offer seemed fair, as did the builder, Brooks Bauer, when Mrs. Holley called him with the same offer. Bauer did express, however, that the offer would have to go through Triad. Later, Stump called Mrs. Holley to tell her that more experienced agents in the office, one of whom was later identified as Grove Crank, felt that $5,000 was insufficient to get the builder to hold the house for six months. The Holleys decided not to raise their offer and Triad never presented the original offer to Bauer. One week later, Bauer inquired at Triad about the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys, telling Bauer that he did not want to deal with those "n" and called them a "salt and pepper team." The Holleys eventually hired a builder to construct a house for them and Bauer later sold his house for approximately $20,000 less than the Holleys had offered.

Bauer and the Holleys filed a complaint on November 14, 1997, alleging that Crank and Triad violated federal and state fair housing laws. They later filed a separate action against David Meyer as officer/broker, president and owner of Triad, covering the same allegations and adding several new claims. The district court consolidated the two cases. The district judge, ruling on a Federal Rule of Civil Procedure 12(b)(6) motion, dismissed all of the claims except the FHA claim, on the grounds that they were barred by the applicable statutes of limitation. Plaintiffs have not appealed this ruling. With regard to the FHA claim, the district court granted the motion to dismiss Meyer in his capacity as an officer of Triad stating that any liability of Meyer as an officer of Triad would attach to Triad in that Plaintiffs have not

urged theories that would justify reaching Meyer individually. Meyer than [sic] moved for summary judgment on the remaining FHA claim. The district court granted Meyer summary judgment on that claim, finding that, during the relevant time, the real estate license was issued to Triad, with Meyer as the designated corporate officer of Triad. Thus, the district court concluded that Crank's discriminatory acts could be imputed to Triad, but not to Meyer as an individual. The district court entered a Rule 54(b) certification of that judgment as final to allow this appeal, and stayed all remaining proceedings against Triad and Crank.

ANALYSIS

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act of 1968 (FHA), broadly prohibits discrimination in housing. 42 U.S.C. § 3601 *et seq*. An examination of the Act reveals a "broad legislative plan to eliminate all traces of discrimination within the housing field." *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir.1974). The FHA itself, however, does not limit or define who can be sued for discriminatory housing practices. The Department of Housing and Urban Development (HUD), the federal agency primarily assigned to implement and administer Title VIII, has developed regulations and guidelines, which this Court affords considerable deference, interpreting when liability attaches under the FHA. *See Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir.1999). Historically, HUD's regulations for administrative complaints have provided, in relevant part:

> A complaint may also be filed against any person who directs or controls, *or has the right to direct or control, the conduct of another person* with respect to any aspect of the sale . . . of dwellings or the provision of brokerage services relating to the sale [ ] of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

24 C.F.R. § 103.20 (1999)[1] (emphasis added).

The FHA provides two means of enforcing its provisions. Under § 3610(a), a person "aggrieved" may file a complaint with HUD, and the agency investigates and resolves the complaint's charges. If the administrative agency is unable to obtain compliance or concludes that judicial action is necessary to carry out the purposes of the Act, a civil suit may be commenced. 42 U.S.C. §§ 3610(e) & (g); 3612. The alternate route for obtaining redress under the FHA is pursuant to § 3613, which provides the right to file suit in a federal or state court without awaiting action by HUD. Thus, the two sections

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[1] The current version of this regulation replaces this language with an apparently more user-friendly provision instructing that a person should notify HUD for assistance in filing a claim if they believe there has been discrimination against them in any activity related to housing because of race, color, religion, national origin, sex, disability, or the presence of children under the age of 18 in a household. 24 C.F.R. § 103.10-20. Absent any indication that HUD intended to narrow liability under the new regulations, we find the previous language instructive regarding the potential scope of liability.

provide parallel remedies for the same prospective plaintiffs and courts have analyzed the provisions as alternate analogous remedies. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 105-8, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (noting HUD's consistent treatment of the two provisions as alternative remedies to precisely the same prospective plaintiffs); *see also Marr v. Rife*, 503 F.2d at 739 (concluding that although the civil action provision fails to indicate the burden of proof to be applied, it would be anomalous for a different burden to apply under that section than is applied under § 3610). Accordingly, we look to HUD's relevant regulatory history for administrative complaints to help determine the scope of liability here.

The district court found that as a matter of law Meyer could not be vicariously liable based on his position as president and officer/broker of Triad. We disagree. Considering the relevant HUD regulation quoted above, Meyer bears potential liability in his capacity as owner, president and officer/broker of the corporation. Additionally, our Court has recognized that the duty to obey the laws relating to racial discrimination under the FHA is non-delegable. *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir.1980). Although officers and shareholders of a corporation generally enjoy immunity from liability for corporate acts, as a matter of furthering the compelling policy of the FHA and because this involves a non delegable duty, we conclude that a corporation and its officers may be held liable for their failure to ensure the corporation's compliance with the FHA, whether or not the officers directed or authorized the

particular discriminatory acts that occurred.[2] While we recognize that holding a corporation and its officers responsible even though the acts of subordinate employees were neither directed nor authorized seems harsh punishment of an otherwise innocent employer, we agree with our sister Circuits in finding that preferable to leaving the burden on the innocent victim who felt the direct harm of the discrimination. *See City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096-97 (7th Cir.1992); *Walker v. Crigler*, 976 F.2d 900, 904-905 (4th Cir.1992). The overriding societal priority of the FHA indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and to ensure that similar harm will not occur again. When one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden. *See Walker*, 976 F.2d at 904.

Meyer's Liability as Sole Owner and Officer of Triad

The district court did not expressly address Meyer's liability as sole owner of Triad and Meyer maintains that Appellants did not sue Meyer as Triad's owner. The complaint against Meyer sued him for FHA violations in his individual capacity *and* as an officer and designated officer/broker of Triad. It does not appear that Meyer could be liable as an individual, as opposed to in his capacity as officer/broker and president of Triad, other than under a theory of vicarious liability as the owner of Triad, as there

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[2] Our decision applies only to vicarious liability for compensatory damages. We do not address vicarious liability for punitive damages as the issue is not before us.

is no allegation that he directly participated in the discrimination. Accordingly, we address his potential liability as sole owner of Triad for FHA violations of employees.

The duty to obey the laws relating to racial discrimination under the FHA is non-delegable. *Phiffer,* 648 F.2d at 552. In *Phiffer,* this court concluded that the owner of the Proud Parrot Motor Hotel Corporation was liable for the discriminatory conduct of his desk clerk even absent any evidence that the clerk acted under management's instruction. *Id.*[3] Although *Phiffer* involved an owner of a motel rather than a real estate corporation, the same rule is compelling here. Triad was directly and immediately involved in the sale of real estate involving the alleged violation. As the real estate agency that allegedly committed the unlawfully discriminatory acts in providing brokerage services for the sale of the property, Triad is connected to the discrimination even more directly than the hotel corporation owner in *Phiffer.* Our rule under *Phiffer* renders the sole owner of a corporation liable based on the non-delegable duty to obey the FHA and, thus, if Meyer owned Triad at the time of the discriminatory acts at issue, he cannot relinquish the responsibility for preventing such discrimination to another party. *Accord Walker v. Crigler,* 976 F.2d 900, 904 (4th Cir.1992).

[3] The court did note that the magistrate had found that the desk clerk's actions reflected established policy of the Proud Parrot. Still, the court's language regarding the non-delegable duty to follow the law is clear and instructive.

In so ruling, we follow the lead of other federal circuit courts. The Seventh Circuit held a realty corporation and its sole shareholder vicariously liable for compensatory damages resulting from individual sales agents' FHA violations even though the sole shareholder had specifically instructed the agents not to discriminate and had not personally joined in any discriminatory acts. *Matchmaker,* 982 F.2d at 1096-98. Noting *Walker*'s policy discussion, the Seventh Circuit agreed with the Fourth Circuit that " 'we must hold those who benefit from the sale and rental of property to the public to the specific mandates of anti-discrimination law if the goal of equal housing opportunity is to be reached.' " *Id.* at 1096 (quoting *Walker,* 976 F.2d at 905). We also agree with this policy.

Matchmaker concluded that as the sole owner of the corporation, the chief executive officer and the supervisor of the day-to-day operations of the corporation and its agents, the defendant should be personally liable for compensatory damages. *Id.* at 1098. We adopt this reasoning and, thus, remand to the district court to allow the Holleys the opportunity to try the issue of Meyer's ownership of Triad at the time of the alleged violations.[4] We

[4] Meyer started Triad in 1974 and was the sole stockholder from 1978 until around February 1995 when he claims he transferred ownership to Crank. Meyer concedes, however, that there is no documentation reflecting this transfer and that he remained the president and designated officer/broker of the company until 1998. When asked about the circumstances of the transfer of ownership, Meyer described having conversations with Crank in which they decided Crank would carry on with the company, take over financial responsibility and day-to-day operations. The only "evidence" that this transfer of ownership occurred in 1995 is "Document 2000" – the minutes of a meeting

agree with the Seventh Circuit that a principal cannot free itself of liability by delegating to an agent the duty not to discriminate. *See id.* at 1096.[5]

While the evidence does not indicate that Crank acted with the approval or at the direction of Meyer, such a finding is not necessary to hold Meyer liable as the sole owner of Triad for breach of a non-delegable duty to comply with the FHA. *See Marr v. Rife*, 503 F.2d at 742. If Meyer solely owned the agency, he had at least the

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in April 1995 making Crank vice-president. Meyer claims that this assignment was associated with the transfer of ownership, despite Meyer remaining president of the company until 1998, and keeping an office there that he used daily until 1997.

The Holleys presented sufficient evidence to entitle them to a trial regarding Meyer's liability as owner of Triad at the time of the alleged discrimination. Appellants also allege that Triad pays its taxes under Meyer's identification number. Furthermore, Meyer executed Crank's renewal of salesperson's license in March 1998 indicating Meyer was the employing broker. At the very least under these circumstances, the alleged undocumented transfer of the corporation is questionable as there would seem to be legal, financial and tax consequences to such a transfer yet there is no explanation or documentation as to how anything was carried out. As such, the issue is one of credibility and fact. Accordingly, we remand to the district court to determine whether Meyer owned Triad during the time at issue and is therefore liable for the agent's discriminatory acts.

[5] The Sixth Circuit also held that a real estate agency owner should be vicariously liable for compensatory damages resulting from salespersons' FHA violations even though there was no evidence that the agent acted with the approval or at the direction of the owner. The court reasoned that the owner of the agency had at least the power to control the acts of his salespersons. *Marr v. Rife*, 503 F.2d 735, 742 (6th Cir.1974).

authority to control the acts of his salespersons, particularly in light of his position as president and officer/broker of Triad. As discussed above, this is enough, under the approach we adopt here and that adopted by a number of courts, to hold Meyer personally liable. *Id.; Matchmaker*, 982 F.2d 1086; *Walker*, 976 F.2d 900; *Northside Realty Assoc. Inc. v. United States*, 605 F.2d 1348, 1354 (5th Cir.1979); *United States v. Tropic Seas, Inc.*, 887 F.Supp. 1347, 1365 (D.Haw.1995); *United States v. Youritan Constr. Co.*, 370 F.Supp. 643, 649 (N.D.Cal.1973), modified as to relief and aff'd, 509 F.2d 623 (9th Cir.1975).

The same reasoning compels Meyer's potential liability in his capacity as president of the corporation. Perhaps more so than in his capacity as sole owner of the company, as an officer of the company he actually did direct or control, or had the right to direct or control, the conduct of the salespersons who allegedly discriminated against the Holleys with respect to the sale of real estate. While we recognize that corporate officers and shareholders are generally shielded from personal liability, we agree with the Seventh Circuit that "where common ownership and management exists, corporate formalities must not be rigidly adhered to when inquiry is made of civil rights violations." *Matchmaker*, 982 F.2d at 1098. Thus, under relevant HUD regulatory history, and because the duty not to discriminate is a non-delegable one, we join other courts in holding that officers can be individually liable for discriminatory acts of corporate employees under their management and control. *See e.g., Tropic Seas*, 887 F.Supp. at 1365; *Northside*, 605 F.2d at 1354 (holding president and vice-president of real estate corporation accountable for discriminatory acts of their

agents, "whether or not the officers directed or authorized the particular discriminatory acts that occurred").

Our decision recognizes the duty under the FHA as non-delegable, furthering the purposes of the FHA. Moreover, as discussed below, Meyer may have neglected his duties to supervise salespeople in their real estate transactions, which included his responsibility to ensure that they follow federal and state anti-discrimination laws.

Meyer's Responsibilities as Designated Officer/Broker of Triad

As designated officer/broker of the company, Meyer was responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees in the performance of acts for which a real estate license is required. Cal. Bus. & Prof.Code § 10159.2(a). Under California law, a real estate broker is required to exercise reasonable supervision over the activities of his or her salespersons, including familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination. 10 Cal.Code Reg. § 2725(f). His failure to do so also bolsters the contention that he should be held personally liable for unlawful discriminatory acts of Triad's salespersons.

Although federal law governs the issue of agency under the FHA, the California licensing scheme is instructive here in discerning Meyer's supervision and control over Triad sales activity. California law provides that "[n]o acts for which a real estate license is required may be performed for, or in the name of, a corporation"

unless the corporation has designated an officer of the corporation to serve as the officer/broker of the company. Cal. Bus. & Prof.Code §§ 10158 & 10211; 10 Cal.Code Reg. § 2740. As a real estate salesperson for Triad, acting under the corporate license, Crank sold real estate under the supervision of the designated officer/broker. Cal. Bus. & Prof.Code § 10159.2(a). Technically, the licensed broker is the corporation, however, as designated broker, under California law, Meyer was personally responsible for this supervision.

The district court interpreted this to mean that Meyer could be personally liable only if Crank operated under a license that Meyer held in his personal capacity rather than as an officer of Triad. Based on the analysis and policy discussed above and the California real estate licensing requirements, we disagree. The designated officer/broker of a real estate corporation in California is responsible for the "supervision and control of the activities conducted on behalf of the corporation by its officers and employees . . . including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required." Cal. Bus. & Prof.Code § 10159.2(a).

The state regulations implementing these real estate licensing laws require that a broker exercise "reasonable supervision" over the activities of salespersons. The regulations define such reasonable supervision as including establishment of "policies, rules, procedures and systems to review, oversee, inspect and manage" transactions requiring a real estate license and familiarizing salespersons with the requirements of federal and state laws prohibiting discrimination. 10 Cal.Code Reg. § 2725.

Meyer does not dispute that he was the designated officer/broker of Triad at the time of the alleged discrimination. Meyer testified that he understood his responsibilities as designated officer/broker at Triad to include making sure that Triad's agents "were acting lawfully, that contracts were negotiated lawfully" and that people were treated lawfully.

Meyer's undisputed responsibility to supervise Triad's salespersons in real estate transactions places him squarely within HUD's regulatory history allowing complaints against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling. *See* 24 C.F.R. § 103.20 (1999). Meyer argues that this regulation is irrelevant here as it applies to administrative complaints rather than civil actions. The Supreme Court, however, has interpreted the statute authorizing an administrative proceeding and that authorizing the filing of a civil action as providing parallel remedies to the same prospective plaintiffs. *Gladstone*, 441 U.S. at 105-08, 99 S.Ct. 1601. The Court inferred the congressional intent to provide all victims of Title VIII violations two alternative mechanisms to "seek redress: immediate suit in federal district court or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail." *Id.* at 104, 99 S.Ct. 1601. This judicial interpretation of the two statutes renders the regulation for administrative complaints highly relevant to the instant civil action.

Although the federal courts have declined to allow state law to control rulings on agency for purposes of FHA violations, consideration of the state licensing

scheme is appropriate here to determine Meyer's involvement or omissions in the alleged discriminatory acts.[6] As both president and designated officer/broker of Triad, Meyer had a duty to prevent unlawful discrimination such as that which is alleged of Triad salesperson Crank. If Meyer breached that duty to supervise then he should be held accountable for such an omission even absent direct involvement or authorization of Crank's alleged discriminatory conduct.

We disagree with the district court's ruling that Meyer could only be liable here if Crank acted under the authority of a license Meyer held personally rather than as a corporate officer of Triad. His responsibilities as designated officer/broker under Triad's corporate license, by mandate of state law, required him to direct and control the conduct of Triad salespersons with respect to the sale of homes and the provision of brokerage services relating to the sale of homes. If Meyer was indeed an officer of the corporation and the designated officer/broker of Triad Realty at the time of the alleged conduct, it is difficult to see how he could be excused from the obligation imposed by the FHA to prohibit discrimination in the housing field.

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[6] Meyer argues that the California real estate licensing law is irrelevant here as California courts have interpreted it as extending a disciplinary scheme rather than creating a private right of action against a designated broker. Appellants here do not attempt to bring a private action under the California statute, rather they argue that the statute is relevant to determining Meyer's responsibilities of supervision in a claim brought under the FHA.

CONCLUSION

In light of the evidence that Meyer was (1) an officer of Triad Realty at the time of the alleged discriminatory acts; (2) the designated broker of the corporation who enabled it to engage in the business of selling real estate; and (3) the sole shareholder of the corporation at the time of the alleged discrimination, we disagree with the district court's conclusion that as a matter of law Meyer cannot be individually liable for damages resulting from the alleged FHA violations. Accordingly, we reverse and remand this case to the District Court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public Plaintiffs, v. DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD INC., doing business as TRIAD REALTORS Defendant.	CV-98-7965-WMB ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS (Filed Mar. 17, 1999)

I. BACKGROUND

Emma Mary Ellen Holley, David Holley, Michael Holley ("Holleys") and Brooks Bauer ("Bauer") (collectively "plaintiffs") filed a complaint on November 14, 1997, alleging that Grove Crank Sr. ("Crank") and Triad Realtors ("Triad") (collectively "defendants") violated federal and state fair housing laws by discriminating against plaintiffs on the basis of their race during an attempt by the Holleys to purchase a house. Plaintiffs also sued David Meyer ("Meyer") in a separate action that nevertheless covered the same allegations and added several new claims. This Court has consolidated the two cases.

Plaintiffs allege that in October 1996, the Holleys visited the Twenty-Nine Palms office of Triad Realtors. There, they met with Triad agent Crank and inquired about listings for new houses in the $100,000 to $150,000 range. Crank took the Holleys to see 4 houses in the area, all of which were above $150,000. In mid-November 1996, the Holleys located a home on their own that happened to be listed with Triad. When the Holleys asked about that house, Ms. Terry Stump ("Stump") a Triad agent, informed them that the asking price for the house was $145,000.

The Holleys wished to make an offer to purchase the house at the listed price, but they wanted to wait until they closed escrow on their existing home. The Holleys indicated to Stump that they would put $5000 in escrow for the builder to hold the house until April or May 1997. Stump told the Holleys that their offer seemed fair. Mrs. Holley also called Bauer, the builder of the house, to tell him that they would offer to pay the listed price for the house, and pay $5000 to hold the house until their escrow closed. Bauer indicated that he thought it seemed fair, but told the Holleys that the offer must go through Triad.

Later, Stump called Mrs. Holley to tell her that other people in the Triad office felt that $5000 was not enough money to get the builder to hold the house for six months. The Holleys decided not to raise their offer, and Stump said that the offer would not be presented to the builder. Stump indicated that Crank and Lois Carroll were the agents in the office who determined that the offer was too low, and that as a newer agent, she had to follow their instructions. The Holleys told Stump that the builder should be able to decide if the offer was fair.

One week later, Bauer stopped by the Triad office to find out the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys and called them a "salt and pepper team." Bauer and the Holleys filed a complaint against Triad with the San Bernardino Fair Housing Council.

In November 1997, Plaintiffs also filed six claims against defendants in this Court: (1) violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3604; (2) violation of 42 U.S.C. § 1982; (3) violation of the California Fair Employment and Housing Act, Cal. Gov. Code § 12955; (4) violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51; (5) unfair business practices in violation of Cal. Bus. & Prof. Code § 17200; and (6) negligence. In October 1998, the plaintiffs asserted four additional claims against Meyer: (1) breach of fiduciary duty to plaintiff Bauer; (2) tortious interference with economic relationship; (3) negligent interference with economic relationship; and (4) violation of the California statutory negligence provisions, Cal. Bus. & Prof. Code §§ 10177(h) & 10159.2.

Intervenor Legion Insurance Company, ("Legion") provided insurance coverage for defendants in the period covered by the allegations of this case. Legion filed a declaratory relief action in which the Holleys and Bauer intervened. The Court granted Legion's summary judgment motion and declared that the alleged acts by defendants were not covered by the insurance and Legion's liability was limited to a $10,000 duty to defend. Defendant Meyer then filed this motion to dismiss.

II. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1887) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). On a motion to dismiss, the court must presume all factual allegations of the pleading to be true and draw all reasonable inferences in favor of the non-moving party. *Id.*

III. DISCUSSION

Meyer moves to dismiss on two individual grounds. First, he claims that as a designated broker who had no part in the discriminatory acts, he cannot be found personally liable. Second, because the complaint was filed in October 1998, Meyer alleges that the statute of limitations bars many of the claims against him.

A. MEYER'S PERSONAL LIABILITY

1. State Claims

Plaintiffs' state that they have not sued Meyer in his individual capacity for violation of state law, although their complaint does not exactly bear this out.[1] Plaintiffs

[1] In their complaint, plaintiffs state that they are suing Meyer in his individual capacity for all claims except for three. Pls' complaint ¶ 6. However, all but two claims are premised on state law violations. In the hearing on February 2, 1999, this

admit that under California law Meyer "cannot be held individually liable unless he participated in the subject transaction." Pls' opp. at 6. Because plaintiffs do not allege that Meyer had anything to do with the actions described in the complaint, Meyer, as a broker, is not individually liable for any state law violations.

California law is very clear that "[a]ny action by the qualifying broker [of a real estate brokerage firm] must be regarded as an action by the corporation and not by the broker as an individual." *Walters v. Marler*, 83 Cal.App.3d 1, 35 (1978). Furthermore, a qualifying broker "may not be held personally liable" for an action of an employee. *See id.*

Plaintiffs call into question the ruling in *Walters* because a year after that court issued its opinion, the California Legislature passed a statute that requires a designated broker to "supervise and control the activities of the sales persons employed by the corporation." Cal. Bus. & Prof. Code § 10159.2. This statute is part of the statutory regulation of real estate brokers that contains sections on licensing requirements and penalties for violations of the regulatory scheme. *See* Cal. Bus. & Prof. Code §§ 10130, 10175-10185. In light of the detailed disciplinary sanctions imposed by §§ 10175-10185, a federal

Court inquired of plaintiffs' counsel whether Meyer was being sued in his individual capacity for violations of California law. Plaintiffs' counsel at that point reiterated the fact that Meyer was not being sued individually for any California law violation. Therefore, this court considers the eight claims premised on California law violations to be directed at Meyer in his role as officer of Triad only.

district court ruled that § 10159.2 does not create a private right of action against a designated broker. *See In re Grabau*, 151 B.R. 227, 232 (N.D.Cal. 1993). The court noted that "[t]he most obvious interpretation of § 10159.2 is that it simply extended [the] disciplinary scheme to apply against designated brokers who failed to properly supervise employees." *Id.*

As far as the allegations against Meyer in his role as officer of Triad are concerned, these claims should be properly asserted against Triad. Triad is not party to this specific case. Furthermore, any liability against Meyer as an officer of Triad would only attach to Triad in that plaintiffs have not urged theories that could justify reaching Meyer individually. Therefore, all state claims against Meyer as an officer of Triad are dismissed.[2]

2. Federal Claims

Though plaintiffs do not contend that Meyer is individually liable for his alleged state law violations, they do seek to find him liable individually both as an officer and designated broker of Triad for the alleged violations of federal law.

The doctrine of respondeat superior applies to actions brought under 42 U.S.C. § 1982 and FHA. *See City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096 (7th Cir. 1992). Principals have been held

[2] Plaintiffs' claims for violation of the Unruh act and for negligence would also be dismissed for being outside the statute of limitations of one year.

liable for the discriminatory actions of their agents in the context of FHA. *See United States v. Ralistrieri*, 981 F.2d 916, 930 (7th Cir. 1992). In most cases where liability is imposed on the principal for the discriminatory acts of an agent, the principal does not need to authorize or know of the discriminatory activity for liability to attach. *See id.*, 981 F.2d at 916. However, the overwhelming majority of these cases takes place in a situation where the principal personally owns the involved real property, as distinguished from the situation where the principal owns a corporation that in turn owns the real property. *See e.g. Walker v. Crigler*, 976 F.2d 900 (4th Cir. 1992); *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975).

As to Meyer's liability for federal violations in his capacity as officer of Triad, these claims should be asserted against Triad which is not party to this specific case. Furthermore, any liability against Meyer as an officer of Triad would only attach to Triad in that plaintiffs have not urged theories that could justify reaching Meyer individually.

Plaintiffs also allege that Meyer is individually liable as a designated broker. Pls' complaint ¶ 6. Although no specific act of discrimination by Meyer is alleged, this factual allegation is not necessary for his individual liability as a designated broker under the federal claims. A licensed broker under whose license employees operate may be liable for the discriminatory actions of those employees. *See Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232, 1303 (N.D. Ohio 1983), *rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985). In *Hilltop* the court deemed that the licensed broker, in that case a

corporation, was "liable for the imputed acts and statements" of those agents operating under the license who participated in violations of the federal housing laws. *See id.* The plaintiffs also sought to attach liability to the owner/president of the corporation. *See id.* The court held that since the agents that committed the discriminatory acts had a "contractual relationship with [the corporation] as broker and not with [the owner/president] as broker, [the agents'] acts and statements [could] not be imputed to [the owner/president.]" *See id.*[3]

Similarly, in *United States v. Lorantffy Care Center*, 999 F.Supp. 1037, 1045 (N.D. Ohio 1998), the U.S. government was seeking to find employees personally liable for the pattern and practice of discrimination allegedly perpetrated by a care center for the elderly. The court noted that there is a right to challenge the "illegal activities of a group of persons even if the individual members" were not engaged in any illegal activity. *See id.* "However, that right is limited. In particular, no individual may be held vicariously liable simply because she is an officer or manager of the company." *Id.* Thus, where the designated broker is a company, the liability attaches to the company

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[3] The court also explained why the owner could not be liable through the piercing of the corporate veil doctrine. "[V]icarious liability may not be imposed on [the owner] because of his other roles at [the corporation] . . . [s]ince he is not the sole owner of the company, his partial stock ownership would not permit a per se piercing of the corporate veil." *Hilltop Realty*, 629 F.Supp. at 1304. The court noted that the owner's status "as president and chief operating officer in and of itself does not render him personally liable for acts of the corporation or its agents or employees" absent a personal participation in the prohibited conduct. *See id.*

and not to the officers of the company who did not engage in discriminatory conduct. *Id.* Therefore, here if plaintiffs establish that a discriminatory act took place by an agent who operated under a broker's license held by Meyer as an individual and not as an officer, they could recover against Meyer individually.

In sum, the Court dismisses Meyer as an officer for all federal and state claims. The Court also dismisses Meyer as an individual from all claims except Claims One and Two which are premised on his being a designated broker.

With respect to Meyer's liability as an individual for violations of federal law the Court needs to address defendant's statute of limitations claim.

B. STATUTE OF LIMITATIONS ANALYSIS

The alleged episodes of discrimination occurred in November 1996. Plaintiffs state that they discovered the alleged discrimination in April 1997. Plaintiffs initiated the action against Meyer in October 1998. Thus a statute of limitations of one year on any particular claim would preclude plaintiffs from asserting that claim against Meyer. Likewise, any claim with a limitations period of two or more years would mean that plaintiffs were within the time period allowed for the bringing of the action against Meyer.

As to the federal claims, defendant only raises the time-barred defense with respect to 42 U.S.C. § 1982 contending that a one year limitation applies. The limitations period begins to run from the "date of the last act."

See Havens Realty Corporation v. Coleman, 455 U.S. 363, 380-81 (1982). Accordingly the limitations period began to run in November 1996 (the latest date of the alleged discrimination).

Plaintiffs attempt to skirt the whole limitations period issue by saying that because Meyer's violation continued until August 1998, the date he ceased being Triad's designated broker, plaintiffs are within a one year limit should this be the applicable period. This argument fails. Plaintiffs point to a line of cases which state that the limitations period only accrues from the date of the last act in cases involving a "pattern" of discrimination. *See Coleman*, 455 U.S. at 380-81.

Plaintiffs attempt to analogize *Coleman* with the facts of this case. However, in *Coleman* there were specific allegations of different instances of discriminatory episodes. *See Coleman*, 455 U.S. at 366. Here, there are no such allegations leveled at Meyer. Plaintiffs' statement that "Meyer continues to engage in grossly negligent conduct by abdicating all responsibility for Triad Realtors" does not rise to the level of a pattern of discrimination. Plaintiffs point to no other allegations of discriminatory conduct by Meyer's subordinates and a mere omission to supervise one employee at one time is not akin to specific episodes of active discrimination. Thus the statute of limitations accrued in November 1996 for the federal claims.

Defendant states that the limitations period for violation of 42 U.S.C. § 1982 is one year. Defendant reaches this conclusion by analogizing a § 1982 claim to a § 1983 claim. The Supreme Court has ruled that § 1983 claims

are governed by the most applicable state statute of limitations period. *See Wilson v. Garcia*, 471 U.S. 261 (1985). Defendant contends that the closest applicable state limitations statute is the California personal injury statute (California Code of Civil Procedure § 340) of one year and therefore this should apply. Plaintiffs' only argument with respect to this claim rests with the "continuing violation" period outlined and rejected above.

One court has held that a one year statute of limitations applies to actions filed under 42 U.S.C. § 1982. *See Mitchell v. Sung*, 816 F.Supp. 597 (N.D.Cal. 1993). In that case, the court determined that § 1982 is akin to §§ 1981 and 1983 because all of this statutory section was part of the same package of rights. *See Mitchell*, 816 F.Supp at 601. Thus, because the Supreme Court had already indicated that §§ 1981 and 1983 were to be governed by state limitations periods for personal injury suits and that relevant period in California is one year, § 1982 claims also carry the same limitations period. *Id.* This Court agrees.

Because the limitations period against Meyer has already expired the Court GRANTS defendant's motion to dismiss Meyer as an individual with respect to the § 1982 claim.

IV. CONCLUSION

For the foregoing reasons the Court: (1) GRANTS defendant's motion to dismiss Claims Two through Ten in their entirety; (2) GRANTS defendant's motion to dismiss Meyer as an officer of Triad in Claim One; and (3)

DENIES defendant's motion to dismiss Meyer as a designated broker in Claim One.

Date: March 15, 1999

/s/ Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne Jr.
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, et. al., Plaintiffs, v. DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD INC., dba TRIAD REALTORS, Defendant.	CV 98-7965-WMB ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed July 26, 1999)

I. BACKGROUND

Emma Mary Ellen Holley, David Holley, Michael Holley ("Holleys") and Brooks Bauer ("Bauer") (collectively "plaintiffs") filed a complaint on November 14, 1997, alleging that Grove Crank Sr. ("Crank") and Triad, Inc, (a California real estate corporation) violated federal and state fair housing laws by discriminating against plaintiffs on the basis of their race during an attempt by the Holleys to purchase a house. Plaintiffs also sued David Meyer ("Meyer") in a separate action that covered the same allegations and added several new claims. The two cases have been consolidated.

Plaintiffs allege that in October 1996, the Holleys visited the Twenty-Nine Palms office of Triad, Inc. There, they met with Triad, Inc. agent Crank and inquired about

listings for new houses in the $100,000 to $150,000 range. Crank took the Holleys to see four houses in the area, all of which were above $150,000. In mid-November 1996, the Holleys located a home on their own that happened to be listed with Triad, Inc. When the Holleys asked about that house, Ms. Terry Stump ("Stump") a Triad, Inc. agent, informed them that the asking price for the house was $145,000.

The Holleys wished to make an offer to purchase that house at the listed price, but they wanted to wait until they closed escrow on their existing home. The Holleys indicated to Stump that they would put $5000 in escrow for the seller to hold the house until April or May 1997. Stump told the Holleys that their offer seemed fair. Mrs. Holley called Bauer, the seller of the house, to tell him that they would offer to pay the listed price for the house, and pay $5000 to hold the house until their escrow closed. Bauer indicated that he thought it seemed fair, but told the Holleys that the offer must go through Triad, Inc.

Later, Stump called Mr. Holley to tell her that other people in the Triad, Inc. office felt that $5000 was not enough money to get the seller to hold the house for six months. The Holleys decided not to raise their offer, and Stump said that the offer would not be presented to Bauer. Stump indicated that Crank and Lois Carroll were the agents in the office who determined that the offer was too low, and that as a newer agent, she had to follow their instructions. The Holleys told Stump that Bauer should be able to decide if the offer was fair.

One week later, Bauer stopped by the Triad, Inc. office to find out the status of the Holleys' offer. Crank

then allegedly used racial statements in referring to the Holleys and called them a "salt and pepper team." Mrs. Holley is African American while her husband is white. Bauer and the Holleys filed a complaint against Triad, Inc. with the San Bernardino Fair Housing Council.

In November 1997, Plaintiffs filed this action alleging six claims against defendants: (1) violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3604; (2) violation of 42 U.S.C. § 1982; (3) violation of the California Fair Employment and Housing Act, Cal. Gov. Code § 12955; (4) violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51; (5) unfair business practices in violation of Cal. Bus. & Prof. Code § 17200; and (6) negligence. In October 1998, the plaintiffs then filed the case against Meyer alleging the earlier claims and adding four additional claims: (1) breach of fiduciary duty to plaintiff Bauer; (2) tortious interference with economic relationship; (3) negligent interference with economic relationship; and (4) violation of the California statutory negligence provisions, Cal. Bus. & Prof. Code §§ 10177(h) & 10159.2.

Intervenor Legion Insurance Company, ("Legion") provided insurance coverage for Triad, Inc. in the period covered by the allegations of this case. Legion filed a declaratory relief action in which the Holleys and Bauer intervened. The Court granted Legion's summary judgment motion and declared that the acts by plaintiffs were not covered by the insurance and Legion's liability was limited to a $10,000 duty to defend.

Defendant Meyer then filed a motion to dismiss. On March 17, 1999, this Court granted Meyer's motion for all eight state claims and for plaintiffs' federal claim based

on the violation of 42 U.SC. § 1982. This Court denied Meyer's motion with respect to the federal claim based on the violation of FHA on the grounds that "if plaintiffs establish that a discriminatory act took place by an agent who operated under a broker's license held by Meyer as an individual and not as an officer, they could recover against Meyer individually." *See* Order Granting in Part and Denying in Part, Def's Motion to Dismiss, at 9. Meyer now moves for summary judgment on the one remaining federal claim.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

The moving party for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of fact for trial. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). When the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact would find other than for the moving party. On an issue for which

the nonmoving party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party satisfies its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed R. Civ. Proc. 56(e). If the nonmoving party fails to make this showing, "the moving party is entitled to judgment as a matter of law." *Celotex Corp.*, 477 U.S. at 323.

III. DISCUSSION

A licensed broker under whose license employees operate may be liable for the discriminatory actions of those employees. *See Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232, 1303 (N.D. Ohio 1983), *rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985). In *Hilltop* the court deemed that the licensed broker, in that case a corporation, was "liable for the imputed acts and statements" of those agents operating under the corporation's license who participated in violations of the federal housing laws. *See id.* The plaintiffs also sought to attach liability to the owner/president of the corporation. *See id.* The court held that since the agents that committed the discriminatory acts had a "contractual relationship with [the corporation] as broker and not with [the owner/president] as broker, [the agents'] acts and

statements [could] not be imputed to [the owner/ president.]" *See id.*[1]

Similarly, in *United States v. Lorantffy Care Center*, 999 F.Supp. 1037, 1045 (N.D. Ohio 1998), the government was seeking to hold employees personally liable for the pattern and practice of discrimination allegedly perpetrated by a care center for the elderly. The court noted that there is a right to challenge the "illegal activities of a group of persons even if the individual members" were not engaged in any illegal activity. *See id.* "However, that right is limited. In particular, no individual may be held vicariously liable simply because she is an officer or manager of the company." *Id.*

Thus, where the license is held by a corporation, the liability attaches to the corporation and not to the officers of the corporation who did not engage in discriminatory conduct. Therefore, the sole issue in this summary judgment motion is whether Meyer, holds his broker's license as an individual or as an officer of Triad, Inc.

In opposing defendant's motion for summary judgment, plaintiffs seem to pay little attention to the

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[1] The court also explained why the owner could not be liable through the piercing of the corporate veil doctrine. "[V]icarious liability may not be imposed on [the owner] because of his other roles at [the corporation] . . . [s]ince he is not the sole owner of the company, his partial stock ownership would not permit a per se piercing of the corporate veil." *Hilltop Realty*, 629 F.Supp. at 1304. The court noted that the owner's status "as president and chief operating officer in and of itself does not render him personally liable for acts of the corporation or its agents or employees" absent a personal participation in the prohibited conduct. *See id.*

Court's framing of the issue concerning the status of Meyer's license. Rather, plaintiffs focus on attempting to argue that the Court misread the law regarding personal liability of principals for the unlawful acts of their agents under FHA.[2] Plaintiffs' arguments have already been addressed and rejected in this Court's previous order and need not be repeated here.

In California, both corporations and individuals have to be licensed to operate as real estate brokers. *See* Cal. Bus. & Prof. Code § 10006. If the licensee is a corporation,

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[2] In his reply brief, defendant correctly points out that instead of addressing the issue pertinent to this summary judgment motion, plaintiffs have framed their arguments in a way that looks like a motion for reconsideration of the Court's order denying in part and granting in part Meyer's motion to dismiss. *See* Def's Reply at 2. Under Central District of California Local Rule 7.16, a motion for reconsideration is only proper in the following circumstances: (1) if there is a material difference in fact or law from that presented to the Court before such decision that, in the exercise of reasonable diligence, could not have been known to the party moving for reconsideration at the time of such decision; or (2) if new material facts emerge or a change of law occurs after the time of such decision; or (3) if there is a manifest showing of a failure to consider material facts presented to the Court before such a decision. A motion for reconsideration shall not in any manner repeat any arguments that were presented in the original motion or opposition. *See Guthy-Renker Fitness, L.L.C. v. Icon Health & Fitness, Inc.*, 179 F.R.D. 264, 275 (C.D.Cal. 1998). A motion for reconsideration cannot be based on evidence that could reasonably have been discovered prior to the court's ruling. *See Hopkins v. Andaya*, 958 F.2d 881, 887 n.5 (9th Cir. 1992). As discussed in the main portion of the text, plaintiffs have presented no scenario under which this Court should reconsider its ruling in Meyer's motion to dismiss.

the license entitles one officer from the corporation to act as a real estate broker for the corporation and he must be designated as such on the license. *See* Cal. Bus. & Prof. Code § 10211. "Each officer of a corporation through whom it is licensed to act as a real estate broker is, while so employed under such license, a licensed real estate broker, but licensed only to act as such for and on behalf of the corporation as an officer." *See* Cal. Bus. & Prof. Code § 10159.

During the time relevant to this case, the real estate license was issued to Triad, Inc. with Meyer as the designated corporate officer of Triad, Inc. Crank was employed by and licensed as a salesperson for Triad, Inc. Therefore, because Triad, Inc. was the licensed broker, Crank's contractual relationship was with Triad, Inc. and not with Meyer. *See Hilltop*, 629 F.Supp. at 1303. Thus, Crank's discriminatory acts are imputed to Triad, Inc. and not to Meyer as an individual. Hence Meyer cannot be held personally liable for Crank's alleged misconduct.

IV. CONCLUSION

For the foregoing reasons, defendant Meyer's motion for summary judgment is GRANTED.

DATE: July 26, 1999

/s/ Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Plaintiffs-Appellants,

v.

GROVE S. CRANK, SR., individually, dba Triad Realtors; TRIAD INC., individually, dba Triad Realtors

Defendants

and

DAVID MEYER, individually and in his capacity as President and designated officer/broker of Triad, Inc., dba Triad Realtors,

Defendant-Appellee.

No. 99-56611

D.C. No. CV-98-07965-WMB-SHX; CV-97-08368-WMB-SHX

ORDER

(Filed Oct. 4, 2001)

Before: HUG, Circuit Judge.

Appellee's motion for stay of the issuance of the mandate pending application for writ of certiorari is GRANTED. Fed. R. App. P. 41(d). The mandate is stayed for ninety (90) days from the date this order is filed. If,

within that period, the Clerk of the Supreme Court advises the Clerk of this Court that a petition for certiorari has been filed, then the mandate shall be further stayed until final disposition of the matter by the Supreme Court.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Plaintiffs-Appellants,

v.

GROVE S. CRANK, SR., individually, dba Triad Realtors; TRIAD INC., individually, dba Triad Realtors

Defendants

and

DAVID MEYER, individually and in his capacity as President and designated officer/broker of Triad, Inc., dba Triad Realtors,

Defendant-Appellee.

No. 99-56611

D.C. No. CV-98-07965-WMB-SHX; CV-97-08368-WMB-SHX

ORDER

(Filed Sept. 19, 2001)

Before: HUG, and B. FLETCHER, Circuit Judges, and ILLSTON, District Judge.*

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* Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

The panel has voted to deny Appellee's petition for rehearing. Judge Hug has voted to deny the suggestion for rehearing en banc, and Judges Fletcher and Illston so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing and suggestion for rehearing en banc are denied.

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42 USCA § 3610

(a) Complaints and answers

(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

(ii) Such complaints shall be in writing and shall contain such information and be in such form as the Secretary requires.

(iii) The Secretary may also investigate housing practices to determine whether a complaint should be brought under this section.

(B) Upon the filing of such a complaint –

(i) the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this subchapter;

(ii) the Secretary shall, not later than 10 days after such filing or the identification of an additional respondent under paragraph (2), serve on the respondent a notice identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this subchapter, together with a copy of the original complaint; (iii) each respondent may file, not later than 10 days after receipt of notice from the Secretary, an answer to such complaint; and

(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), unless it is impracticable to do so.

(C) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so. (D) Complaints and answers shall be under oath or affirmation, and may be reasonably and fairly amended at any time.

(2)(A) A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, under paragraph (1), to such person, from the Secretary.

(B) Such notice, in addition to meeting the requirements of paragraph (1), shall explain the basis for the Secretary's belief that the person to whom the notice is addressed is properly joined as a respondent.

(b) Investigative report and conciliation

(1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the

extent feasible, engage in conciliation with respect to such complaint.

(2) A conciliation agreement arising out of such conciliation shall be an agreement between the respondent and the complainant, and shall be subject to approval by the Secretary.

(3) A conciliation agreement may provide for binding arbitration of the dispute arising from the complaint. Any such arbitration that results from a conciliation agreement may award appropriate relief, including monetary relief.

(4) Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the Secretary determines that disclosure is not required to further the purposes of this subchapter.

(5)(A) At the end of each investigation under this section, the Secretary shall prepare a final investigative report containing –

(i) the names and dates of contacts with witnesses;

(ii) a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

(iii) a summary description of other pertinent records;

(iv) a summary of witness statements; and

(v) answers to interrogatories.

(B) A final report under this paragraph may be amended if additional evidence is later discovered.

(c) Failure to comply with conciliation agreement

Whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed under section 3614 of this title for the enforcement of such agreement.

(d) Prohibitions and requirements with respect to disclosure of information

(1) Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned.

(2) Notwithstanding paragraph (1), the Secretary shall make available to the aggrieved person and the respondent, at any time, upon request following completion of the Secretary's investigation, information derived from an investigation and any final investigative report relating to that investigation.

(e) Prompt judicial action

(1) If the Secretary concludes at any time following the filing of a complaint that prompt judicial action is necessary to carry out the purposes of this subchapter, the Secretary may authorize a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint under this section. Upon receipt of such an authorization, the Attorney General shall promptly commence and maintain such an action. Any temporary

restraining order or other order granting preliminary or temporary relief shall be issued in accordance with the Federal Rules of Civil Procedure. The commencement of a civil action under this subsection does not affect the initiation or continuation of administrative proceedings under this section and section 3612 of this title.

(2) Whenever the Secretary has reason to believe that a basis may exist for the commencement of proceedings against any respondent under sections 3614(a) and 3614(c) of this title or for proceedings by any governmental licensing or supervisory authorities, the Secretary shall transmit the information upon which such belief is based to the Attorney General, or to such authorities, as the case may be.

(f) Referral for State or local proceedings

(1) Whenever a complaint alleges a discriminatory housing practice –

(A) within the jurisdiction of a State or local public agency; and

(B) as to which such agency has been certified by the Secretary under this subsection; the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint.

(2) Except with the consent of such certified agency, the Secretary, after that referral is made, shall take no further action with respect to such complaint unless –

(A) the certified agency has failed to commence proceedings with respect to the complaint before the end of the 30th day after the date of such referral;

(B) the certified agency, having so commenced such proceedings, fails to carry forward such proceedings with reasonable promptness; or

(C) the Secretary determines that the certified agency no longer qualifies for certification under this subsection with respect to the relevant jurisdiction.

(3)(A) The Secretary may certify an agency under this subsection only if the Secretary determines that –

(i) the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made;

(ii) the procedures followed by such agency;

(iii) the remedies available to such agency; and

(iv) the availability of judicial review of such agency's action; are substantially equivalent to those created by and under this subchapter.

(B) Before making such certification, the Secretary shall take into account the current practices and past performance, if any, of such agency.

(4) During the period which begins on September 13, 1988, and ends 40 months after September 13, 1988, each agency certified (including an agency certified for interim referrals pursuant to 24 CFR 115.11, unless such agency is subsequently denied recognition under 24 CFR 115.7) for the purposes of this subchapter on the day before September 13, 1988 shall for the purposes of this subsection be considered certified under this subsection with respect to those matters for which such agency was certified on September 13, 1988. If the Secretary determines in an individual case that an agency has not been able to meet

the certification requirements within this 40-month period due to exceptional circumstances, such as the infrequency of legislative sessions in that jurisdiction, the Secretary may extend such period by not more than 8 months.

(5) Not less frequently than every 5 years, the Secretary shall determine whether each agency certified under this subsection continues to qualify for certification. The Secretary shall take appropriate action with respect to any agency not so qualifying.

(g) Reasonable cause determination and effect

(1) The Secretary shall, within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.
(2)(A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice

has occurred or is about to occur, the Secretary shall, except as provided in subparagraph (C), immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 3612 of this title.

(B) Such charge –

(i) shall consist of a short and plain statement of the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(ii) shall be based on the final investigative report; and

(iii) need not be limited to the facts or grounds alleged in the complaint filed under subsection (a) of this section.

(C) If the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General for appropriate action under section 3614 of this title, instead of issuing such charge.

(3) If the Secretary determines that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall promptly dismiss the complaint. The Secretary shall make public disclosure of each such dismissal.

(4) The Secretary may not issue a charge under this section regarding an alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

(h) Service of copies of charge

After the Secretary issues a charge under this section, the Secretary shall cause a copy thereof, together with information as to how to make an election under section 3612(a) of this title and the effect of such an election, to be served –

(1) on each respondent named in such charge, together with a notice of opportunity for a hearing at a time and place specified in the notice, unless that election is made; and

(2) on each aggrieved person on whose behalf the complaint was filed.

---

42 USCA § 3612

a) Election of judicial determination

When a charge is filed under section 3610 of this title, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (o) of this section in lieu of a hearing under subsection (b) of this section. The election must be made not later than 20 days after the receipt by the electing person of service under section 3610(h) of this title or, in the case of the Secretary, not later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates.

(b) Administrative law judge hearing in absence of election

If an election is not made under subsection (a) of this section with respect to a charge filed under section 3610 of this title, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge issued under section 3610 of this title. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under section 3105 of Title 5. The administrative law judge shall conduct the hearing at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

(c) Rights of parties

At a hearing under this section, each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas under section 3611 of this title. Any aggrieved person may intervene as a party in the proceeding. The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.

(d) Expedited discovery and hearing

(1) Discovery in administrative proceedings under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the need of all parties to obtain relevant evidence.

(2) A hearing under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the needs and rights of the parties to obtain a fair hearing and a complete record.

(3) The Secretary shall, not later than 180 days after September 13, 1988, issue rules to implement this subsection.

(e) Resolution of charge

Any resolution of a charge before a final order under this section shall require the consent of the aggrieved person on whose behalf the charge is issued.

(f) Effect of trial of civil action on administrative proceedings

An administrative law judge may not continue administrative proceedings under this section regarding any alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

(g) Hearings, findings and conclusions, and order

(1) The administrative law judge shall commence the hearing under this section no later than 120 days following the issuance of the charge, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance

of the charge, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(2) The administrative law judge shall make findings of fact and conclusions of law within 60 days after the end of the hearing under this section, unless it is impracticable to do so. If the administrative law judge is unable to make findings of fact and conclusions of law within such period, or any succeeding 60-day period thereafter, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(3) If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent –

(A) in an amount not exceeding $10,000 if the respondent has not been adjudged to have committed any prior discriminatory housing practice;

(B) in an amount not exceeding $25,000 if the respondent has been adjudged to have committed one other discriminatory housing practice during the 5-year period ending on the date of the filing of this charge; and

(C) in an amount not exceeding $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory housing practices during the 7-year period ending on the date of the filing of this charge; except that if the acts constituting the discriminatory housing practice that is the object of the charge are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice, then the civil penalties set forth in subparagraphs (B) and (C) may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred.

(4) No such order shall affect any contract, sale, encumbrance, or lease consummated before the issuance of such order and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the charge filed under this subchapter.

(5) In the case of an order with respect to a discriminatory housing practice that occurred in the course of a business subject to a licensing or regulation by a governmental agency, the Secretary shall, not later than 30 days after the date of the issuance of such order (or, if such order is judicially reviewed, 30 days after such order is in substance affirmed upon such review) –

(A) send copies of the findings of fact, conclusions of law, and the order, to that governmental agency; and

(B) recommend to that governmental agency appropriate disciplinary action (including, where appropriate, the suspension or revocation of the license of the respondent).

(6) In the case of an order against a respondent against whom another order was issued within the preceding 5 years under this section, the Secretary shall send a copy of each such order to the Attorney General.

(7) If the administrative law judge finds that the respondent has not engaged or is not about to engage in a discriminatory housing practice, as the case may be, such administrative law judge shall enter an order dismissing the charge. The Secretary shall make public disclosure of each such dismissal.

(h) Review by Secretary; service of final order

(1) The Secretary may review any finding, conclusion, or order issued under subsection (g) of this section. Such review shall be completed not later than 30 days after the finding, conclusion, or order is so issued; otherwise the finding, conclusion, or order becomes final.

(2) The Secretary shall cause the findings of fact and conclusions of law made with respect to any final order for relief under this section, together with a copy of such order, to be served on each aggrieved person and each respondent in the proceeding.

(i) Judicial review

(1) Any party aggrieved by a final order for relief under this section granting or denying in whole or in part the relief sought may obtain a review of such order under chapter 158 of Title 28.

(2) Notwithstanding such chapter, venue of the proceeding shall be in the judicial circuit in which the discriminatory housing practice is alleged to have occurred, and filing of the petition for review shall be not later than 30 days after the order is entered.

(j) Court enforcement of administrative order upon petition by Secretary

(1) The Secretary may petition any United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred or in which any respondent resides or transacts business for the enforcement of the order of the administrative law judge and for appropriate temporary relief or restraining order, by filing in such court a written petition praying that such order be enforced and for appropriate temporary relief or restraining order.

(2) The Secretary shall file in court with the petition the record in the proceeding. A copy of such petition shall be forthwith transmitted by the clerk of the court to the parties to the proceeding before the administrative law judge.

(k) Relief which may be granted

(1) Upon the filing of a petition under subsection (i) or (j) of this section, the court may –

(A) grant to the petitioner, or any other party, such temporary relief, restraining order, or other order as the court deems just and proper;

(B) affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings; and

(C) enforce such order to the extent that such order is affirmed or modified.

(2) Any party to the proceeding before the administrative law judge may intervene in the court of appeals.

(3) No objection not made before the administrative law judge shall be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

(l) Enforcement decree in absence of petition for review

If no petition for review is filed under subsection (i) of this section before the expiration of 45 days after the date the administrative law judge's order is entered, the administrative law judge's findings of fact and order shall be conclusive in connection with any petition for enforcement –

(1) which is filed by the Secretary under subsection (j) of this section after the end of such day; or (2) under subsection (m) of this section.

(m) Court enforcement of administrative order upon petition of any person entitled to relief

If before the expiration of 60 days after the date the administrative law judge's order is entered, no petition for review has been filed under subsection (i) of this section, and the Secretary has not sought enforcement of the order under subsection (j) of this section, any person

entitled to relief under the order may petition for a decree enforcing the order in the United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred.

(n) Entry of decree

The clerk of the court of appeals in which a petition for enforcement is filed under subsection (l) or (m) of this section shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary, the respondent named in the petition, and to any other parties to the proceeding before the administrative law judge.

(o) Civil action for enforcement when election is made for such civil action

(1) If an election is made under subsection (a) of this section, the Secretary shall authorize, and not later than 30 days after the election is made the Attorney General shall commence and maintain, a civil action on behalf of the aggrieved person in a United States district court seeking relief under this subsection. Venue for such civil action shall be determined under chapter 87 of Title 28.

(2) Any aggrieved person with respect to the issues to be determined in a civil action under this subsection may intervene as of right in that civil action.

(3) In a civil action under this subsection, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may grant as relief any relief which a court could grant with respect to such

discriminatory housing practice in a civil action under section 3613 of this title. Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under section 3613 of this title shall also accrue to that aggrieved person in a civil action under this subsection. If monetary relief is sought for the benefit of an aggrieved person who does not intervene in the civil action, the court shall not award such relief if that aggrieved person has not complied with discovery orders entered by the court.

(p) Attorney's fees

In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under this section, the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section, 504 of Title 5 or by section 2412 of Title 28.

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42 USCA § 3613

a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing

practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.

(b) Appointment of attorney by court

Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may –

(1) appoint an attorney for such person; or

(2) authorize the commencement or continuation of a civil action under subsection (a) of this section without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

(d) Effect on certain sales, encumbrances, and rentals

Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this subchapter.

(e) Intervention by Attorney General

Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 3614(e) of this title in a civil action to which such section applies.

(1999)

24 C.F.R. § 103.10 Submission of information.

(a) The Assistant Secretary will receive information concerning alleged discriminatory housing practices from any person. Where the information constitutes a complaint within the meaning of the Fair Housing Act and this part and is furnished by an aggrieved person, it will be considered to be filed under § 103.40. Where additional information is required for purposes of perfecting a complaint under the Fair Housing Act, HUD will advise what additional information is needed and will provide appropriate assistance in the filing of the complaint.

(b) HUD may also concurrently initiate compliance reviews under other appropriate civil rights authorities, such as E.O. 11063 on Equal Opportunity in Housing, title VI of the Civil Rights Act of 1964, section 109 of the Housing and Community Development Act of 1974, section 504 of the Rehabilitation Act of 1973 or the Age Discrimination Act (42 U.S.C. 6101). The information may also be made available to any other Federal, State or local agency having an interest in the matter. In making available such information, steps will be taken to protect the confidentiality of any informant or complainant where desired by the informant or complainant.

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24 C.F.R. § 103.15 Who may file complaints.

Any aggrieved person or the Assistant Secretary may file a complaint no later than one year after an alleged discriminatory housing practice has occurred or terminated. The complaint may be filed with the assistance of an authorized representative of an aggrieved person, including any organization acting on behalf of an aggrieved person.

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24 C.F.R. § 103.20 Persons against whom complaints may be filed.

(a) A complaint may be filed against any person alleged to be engaged, to have engaged, or to be about to engage, in a discriminatory housing practice.

(b) A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale, rental, advertising or financing of dwellings or the provision of brokerage services relating to the sale or rental of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

(2000)

24 C.F.R. § 103.10 What can I do if I believe someone is discriminating against me in the sale, rental, finance, or advertisement of housing?

You can notify HUD if you believe there has been discrimination against you in any activity related to housing because of race, color, religion, national origin, sex, disability, or the presence of children under the age of 18 in a household.

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24 C.F.R. § 103.15 Can I file a claim if the discrimination has not yet occurred?

Yes, you may file a claim with HUD if you have knowledge that a discriminatory action is about to occur.

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24 C.F.R. § 103.20 Can someone help me with filing a claim?

HUD's Office of Fair Housing and Equal Opportunity can help you in filing a claim, if you contact them directly. You, or anyone who acts for you, may also ask any HUD office or an organization, individual, or attorney to help you.

Supreme Court, U.S.
FILED
APR 8 2002
CLERK

(3)

No. 01-1120

In The

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of TRIAD, INC., doing business as TRIAD REALTORS,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRANCART & BRANCART
ELIZABETH BRANCART
Counsel of Record
CHRISTOPHER BRANCART
Post Office Box 686
Pescadero, California 94060
(650) 879-0141

LAW OFFICE OF GREG ALEXANIAN
GREG ALEXANIAN
10154 Riverside Drive
Toluca Lake, California 91602
(818) 760-3386

Attorneys for Respondents Emma Mary Ellen Holley; David Holley; Michael Holley, a minor; and Brooks Bauer

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

The record shows that this case is not the one described by petitioner in his petition, nor that described in the amicus curiae brief filed by the California Association of REALTORS® ("CAR"). In deciding whether to grant the writ of certiorari, this Court should consider the following additional material facts not included in petitioner's brief, but contained in the record in the court of appeals. *Holley v. Crank*, 258 F.3d 1127 (9th Cir. 2001); Petition Appendix ("Pet.App.") at 1. This is not a case of an "innocent" corporate officer/owner being held strictly liable under the Fair Housing Act based solely on his status. Instead, this case presents the unusual circumstances where a corporate officer/owner *and* real estate broker completely abdicated his responsibilities for supervising his real estate salespersons. Indeed, the record shows that petitioner delegated his corporate and broker duties to a salesperson whom petitioner himself was under a professional duty to supervise. Rather than breaking new ground on vicarious liability, as claimed by petitioner, the court of appeals applied well-established principles of agency to hold, on this record, that petitioner cannot escape liability as a matter of law, reversing the district court. The court of appeals remanded the case for further examination of the facts in the district court.[1]

---

[1] As well as arising in part out of the district court's partial grant of Meyer's motion to dismiss as stated by petitioner, Pet. at 2 n.1, this appeal also arose out of the district court's grant of summary judgment in favor of Meyer. 258 F.3d at 1130; Pet. App. 3-4, 29-36.

A number of significant facts are missing from the petition and should be considered by this Court in making its decision. Those facts follow.

It is undisputed that petitioner David Meyer ("Meyer") was the sole California state licensed *officer/broker* of Triad, Inc. ("Triad") at the time of the alleged discriminatory housing practices. District Court Clerk's Record ("Record") 27 at 5-7, 20-21, 27-29, 35-37, 39-41, 111; Record 28 at 4-9. It is undisputed that Meyer was the only person at Triad whose professional qualifications enabled Triad to hold a corporate real estate broker's license. 258 F.3d at 1135; Pet.App. at 14; Record 27 at 5-7, 20-21, 27-29, 35-37, 39-41, 111; Record 28 at 4-9. It is undisputed that Meyer was the *president* of Triad at the time of the alleged discriminatory housing practices. Record 27 at 111; Record 28 at 5. It is undisputed that Meyer was the *sole shareholder* of Triad from approximately 1978 until at least February 1995. Record 27 at 114; Record 28 at 8-9. Although Meyer claimed that he had transferred his entire ownership interest in Triad to Grove Crank in February 1995, the court of appeals found that respondents had raised a genuine issue of fact whether Meyer was still the sole shareholder of Triad at the time of the discriminatory housing practices alleged in this case. 258 F.3d at 1133 n.4, 1136; Pet.App. 10-11, 16. It is undisputed that at the time of the alleged discriminatory housing practices, Grove Crank was a California real estate salesperson licensed under Triad's corporate broker's license, and the vice-president of Triad. 258 F.3d at 1133 n.4; App. 9-10 n.4; Record 23 at exh. D; Record 24 at 1-2.

Meyer admits that, as the designated *officer/broker* for Triad, he was responsible for ensuring that Triad agents were acting in a lawful manner, that they observed the standards promulgated by the California Department of Real Estate, and that members of the public were treated lawfully by them. 258 F.3d at 1135; App. 14; Record 27 at 125-126; Record 28 at 6. Meyer admits that, as the designated *officer/broker* for Triad, he was ultimately responsible for the activities of Triad. Record 27 at 136; Record 28 at 6. Meyer also admits that, as the *president* of Triad, he was ultimately responsible for the activities of Triad. Record 27 at 136; Record 28 at 6.

Meyer claims that between April 1995 and August 1998, which includes the time relevant to this case, he fulfilled his duties as designated *officer/broker* and *president* of Triad "through" Grove Crank. Record 27 at 127; Record 28 at 8. Meyer further admits that between April 1995 and August 1998, he did not review any Triad paperwork regarding finalized real estate transactions because he had delegated that responsibility to Grove Crank. Record 27 at 134; Record 28 at 8. But, Meyer failed to provide any training for Crank regarding the review of final transactions before he delegated that responsibility to Crank. Record 27 at 134; Record 28 at 8. In fact, during that same time period, Meyer did not provide any training regarding fair housing laws to any Triad staff nor does he recall anyone else providing such training. Record 27 at 135; Record 28 at 8.

Moreover, there is a question of fact in the record regarding what role Meyer played at Triad. In the district court, Meyer himself presented what could be construed

as conflicting testimony under penalty of perjury regarding that role. On May 15, 1998, Meyer signed a declaration under penalty of perjury submitted to the district court in opposition to plaintiffs' motion to add him as a defendant in the related case, stating that he "was formerly associated with Triad Inc." but has "not been involved in the day-to-day management of the business [Triad] since February of 1995" though "technically still an officer with the corporation." Record 27 at 142. Later, in his deposition in this case, Meyer admitted that he had an office at Triad which he used on a daily basis until sometime in 1997. Record 27 at 131-132; Record 28 at 7. He also admitted that he was involved in real estate transactions and received commissions through Triad between 1995 and 1998. Record 27 at 117-118, 133-134; Record 28 at 5.

REASONS FOR DENYING THE WRIT

According to Meyer, the question presented here is whether the federal Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ("Title VIII"), diverges from well-established rules of agency law so that "owners and officers of corporations are absolutely liable for an employee's or agent's violation of the Act, whether or not they personally directed, authorized, or were even aware of the particular acts that occurred." Petition ("Pet.") at i. Meyer argues that the court of appeals decided an important question of federal law, holding that the Fair Housing Act "abrogates established rules of vicarious liability." Pet. at 5. The court of appeals' decision in this case does nothing of the sort.

This case involves the application of settled agency law principles to an unusual set of facts. Under the Fair Housing Act, as interpreted by the Department of Housing and Urban Development ("HUD") and the lower federal courts, a person may be held vicariously liable for discriminatory housing practices committed by employees or agents whom he directed or controlled or had the right to direct or control. That interpretation also comports with this Court's repeated guidance that the federal courts should look to the common law of agency to determine vicarious liability under the federal civil rights statutes. Applying those settled principles to this case, the court of appeals correctly found that the district court erred in ruling, as a matter of law, that Meyer could not be held vicariously liable for the discriminatory housing practices against respondents in this case.

Meyer asserts four specific reasons for granting the writ in this case. First, Meyer claims that the court of appeals incorrectly relied upon an outdated HUD regulation in construing the Fair Housing Act, creating a conflict with a decision of the Fourth Circuit. Pet. at 6. In fact, the court of appeals merely referred to the HUD regulation which is in harmony with established principles of vicarious liability under the Fair Housing Act. Second, Meyer argues that the court of appeals "misapplied the law" with respect to vicarious liability in a fundamentally significant manner that requires correction by this Court. Pet. at 13. In fact, the court of appeals applied well-established agency principles to the facts of the case. Third, Meyer maintains that the court of appeals' decision is an unwarranted expansion of the scope of liability under the Fair Housing Act. Pet. at 16.

In fact, the decision of the court of appeals is consistent with the decisions of other circuits applying well-established agency principles. Finally, Meyer urges that the issue presented by this case is of national importance. Pet. at 17. In fact, the court of appeals held only that, based upon the facts of record, Meyer could not escape liability under the Fair Housing Act as a matter of law and remanded for further proceedings. Upon examination, none of Meyer's assertions is meritorious or warrants the grant of certiorari by this Court.

Also significant to this Court's decision to deny the writ should be the fact that Meyer fails to address the court of appeals' third basis for finding him potentially liable – Meyer's role as the sole designated *officer/broker* of Triad, whose professional qualifications and agreement to supervise the Triad real estate salespersons served as a requirement for the State of California's licensure of Triad. 258 F.3d at 1134-35; App. 12-15. Meyer's duties and supervisory role at Triad as *officer/broker* were vital to the court of appeals' decision that he had the right to direct and control the conduct of the Triad salespersons. Because of Meyer's special role at Triad and the combination of his positions as *officer/broker*, *president* and *sole owner* of a small real estate office, this case utterly fails to present the issues raised by Meyer concerning the imposition of strict liability on "innocent" corporate officers and owners under the Fair Housing Act. Accordingly, the grant of certiorari in this case would be inappropriate and the petition should be denied.

ARGUMENT

I

THE COURT OF APPEALS PROPERLY LOOKED TO HUD'S ADMINISTRATIVE REGULATIONS FOR GUIDANCE IN INTERPRETING THE FAIR HOUSING ACT IN THIS CASE.

Meyer claims that the court of appeals erroneously relied on an outdated and inapplicable HUD regulation to interpret the criteria for vicarious liability under the Fair Housing Act. Pet. at 9-12. Although the court of appeals looked to former 24 C.F.R. section 103.20(b) (1999) for guidance in determining who may be liable under the Fair Housing Act, it acknowledged that the regulations had been revised by HUD in 1999. 258 F.3d at 1131, n.1; Pet.App. at 5 n.1. That revision, however, did not affect the court's proper analysis.

The Fair Housing Act prohibits discrimination in the sale or rental of a dwelling on account of race, color, religion, sex, handicap, familial status or national origin. 42 U.S.C. § 3601, *et seq*. In enacting the Fair Housing Act, Congress did not define or limit the category of persons who could be found liable for discriminatory housing practices. For example, the provisions of 42 U.S.C. section 3604 state that "it shall be unlawful" to engage in certain discriminatory housing practices, and section 3605 makes it unlawful "for any person or other entity whose business includes engaging in residential real estate-related transactions" to engage in discriminatory housing practices. The stated policy of the Fair Housing Act is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. This

Court has repeatedly emphasized that the Fair Housing Act must be given a "generous construction" in order to carry out a "policy that Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211, 212, 93 S. Ct. 364, 34 L.Ed.2d 415 (1972). *See also City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731, 115 S. Ct. 1776, 131 L.Ed.2d 801 (1995) (the Fair Housing Act has a "broad and inclusive" compass and is accorded a "generous construction").

Congress has given HUD the authority and responsibility for administering the Fair Housing Act. 42 U.S.C. § 3608(a). Accordingly, HUD's construction of the statutory scheme it is entrusted to administer is accorded considerable weight. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). In conjunction with the passage of the Fair Housing Amendments Act of 1988, Congress charged HUD with making rules for carrying out the Fair Housing Act. 42 U.S.C. § 3614a; Pub.L. 100-430, 102 Stat. 1619. Pursuant to that authority, HUD has developed regulations and guidelines interpreting the Act. 42 U.S.C. § 3614a; 24 C.F.R. part 100, subchapter A.

At the time of the occurrence of the discriminatory housing practices alleged in this case, as well as at the time plaintiffs filed their complaint against Meyer in the district court, HUD regulations for the filing of administrative complaints provided:

> (a) A complaint may be filed against any person alleged to be engaged, to have engaged, or to be about to engage in a discriminatory housing practice.

> (b) A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale, rental, advertising or financing of dwellings or the provision of brokerage services relating to the sale or rental of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

24 C.F.R. § 103.20 (1999) ("Persons against whom complaints may be filed").

Meyer correctly quotes from HUD's comments accompanying the publication of the final rule, codified at 24 C.F.R. section 103.20, stating that HUD did not intend to impose strict liability on any principal, but intended to follow the law "enunciated by the courts in recent Fair Housing Act cases with respect to the liability of a principal for acts of an agent." Accordingly, HUD revised its proposed rule to state that a complaint may be filed against a directing or controlling person with respect to the discriminatory acts of another if the other person was acting within the scope of his or her authority as employee or agent of the directing or controlling person. 53 Fed.Reg. 24184, 24185 (1988); 24 C.F.R. § 103.20(b).

Meyer nonetheless claims that former section 103.20 has no application to this case, even as a starting point, because it is directed at HUD administrative complaints, rather than direct federal court actions. Pet. at 10-11. Although the case at bar is a direct civil action filed under 42 U.S.C. section 3613, HUD's interpretation of the requirements for filing an administrative complaint

under 42 U.S.C. section 3610 is significant. This Court has previously held that section 3610 providing for an administrative action, and former section 3612 (now section 3613) providing for a direct court action, provide different paths to the same remedies to the same prospective plaintiffs. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 105-108, 99 S. Ct. 1601, 60 L.Ed.2d 66 (1979). In *Gladstone*, this Court discussed at length that the two remedies were parallel and concluded that "[t]he most plausible inference to be drawn from Title VIII is that Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal district court or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail." 441 U.S. at 104. Thus, HUD's interpretation of who may be a proper party defendant in an administrative proceeding under the Fair Housing Act, as set forth in 24 C.F.R. section 103.20, has relevance to the determination of who may be a proper defendant under the Fair Housing Act in a civil action in federal court.

Meyer also argues that the court of appeals should not have considered section 103.20 because it was amended by HUD in 1999 and was no longer in effect at the time of the decision of the court of appeals. Pet. at 9-10. Meyer claims that the former regulation was improperly considered because "[t]he new regulations completely abolished any reference to liability of 'any person' with 'the right to direct or control the conduct of another person' with respect to housing, and in so doing eliminated the very language relied on by the court of

appeals to support its decision." Pet. at 10. Meyer is mistaken.

The court of appeals did not err in looking to former 24 C.F.R. section 103.20(b) for guidance in construing the Fair Housing Act. Absent any indication that HUD intended to narrow the scope of liability, the court of appeals found the regulation instructive. 258 F.3d at 1131 n.1; Pet.App. at 5 n.1. In fact, HUD expressed no intention to limit liability when it amended its regulations in 1999. To the contrary, the Findings and Certifications section of the interim rule publication specifically states that "[t]he rule does not make substantive changes to the regulations." 64 Fed.Reg. 18538, 18539 (Apr. 14, 1999).[2] The interim rule was adopted as a final rule on August 27, 1999. 64 Fed.Reg. 46843 (Aug. 27, 1999).

The court of appeals did not err in finding former 24 C.F.R. section 103.20(b) instructive. Moreover, even if the regulation had no application, the analysis employed by the court of appeals applies federal common law agency principles and comports with similar decisions by other courts of appeals, as discussed in Part II below.

Similarly, Meyer's claim that the court of appeals' reliance on section 103.20(b) has created a conflict in the

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[2] The "direct or control" language formerly in section 103.20(b) was moved to revised section 103.202 entitled "Notification of respondent; joinder of additional or substitute respondents," which provides for the service of notice of any fair housing complaint "on any person who directs or controls, or who has the right to direct or control, the conduct of another person who is involved in a fair housing complaint." 64 Fed.Reg. at 18540-41; 24 C.F.R. § 103.202(b) (2002).

circuits should be rejected. Although a divided panel of the Fourth Circuit found that section 103.20(b) had no application in deciding who could be sued for discriminatory housing practices in a direct action in federal court, that decision was in contravention of this Court's opinion in *Gladstone*, 441 U.S. at 104. *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992). Even if a true conflict existed, it would be very tangential to the issues in this case and would not justify the grant of certiorari. *See Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 392, 43 S. Ct. 422, 67 L.Ed. 712 (1923) (certiorari reserved for cases in which there exists "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals").

II

EVEN IF THE HUD REGULATION HAD NO APPLICATION, THE COURT OF APPEALS APPLIED, AND STAYED WITHIN THE BOUNDS OF, WELL-SETTLED PRINCIPLES OF VICARIOUS LIABILITY IN THIS CASE.

Meyer claims that the court of appeals has construed his liability under the Fair Housing Act in a manner that "abrogates established rules of vicarious liability," which resulted in an unwarranted expansion of liability under the Act. Pet. at 5, 7, 12, 16. Meyer further posits that this case presents an important issue of federal law. None of these contentions has merit.

Although this Court has not decided the scope of vicarious liability under the Fair Housing Act, it has construed vicarious liability under other federal civil

rights laws by looking not to state law, but to the common law of agency as set forth in the Restatement (Second) of Agency (1958) ("Restatement"). *See, e.g., Kolstad v. American Dental Ass'n*, 527 U.S. 526, 527, 119 S. Ct. 2118, 144 L.Ed.2d 494 (1999) (looking to Restatement as starting point in construing Title VII punitive damages liability); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754-55, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998) (looking to Restatement as starting point in construing Title VII employer vicarious liability); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392, 102 S. Ct. 3141, 73 L.Ed.2d 835 (1982) (relying on Restatement in discussing vicarious liability under 42 U.S.C. § 1981). The Court has also used the Restatement to construe agency-related issues with respect to other federal statutory schemes. *See, e.g., Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52, 109 S. Ct. 2166, 104 L.Ed.2d 811 (1989) (relying on Restatement of Agency to construe "employee" under Copyright Act of 1976); *Cf. Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-24 & n.3, 112 S. Ct. 1344, 117 L.Ed.2d 581 (1992) (relying on *Reid* to apply traditional agency principles to construe "employee" under ERISA).

Consistent with that approach, the lower federal courts have held that whether an agency relationship exists for purposes of the Fair Housing Act is determined by looking to federal, not state, law. *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) (relying on federal law of agency under Fair Housing Act); *Cabrera v. Jakabovitz*, 24 F.3d 372, 386 n. 13 (2d Cir. 1994) (same); *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1097 (7th Cir. 1992), *cert. denied*, 508 U.S. 972, 113 S. Ct.

2961, 125 L.Ed.2d 662 (1993) (same); *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974) (same).

In interpreting who may be vicariously liable for violations of the Fair Housing Act under common law agency principles, federal courts have found liability under the doctrine of respondeat superior against many different types of defendants for the acts of their agents or employees, including property owners, real estate brokers, property managers or supervisors and corporate officers. *See, e.g., Cabrera v. Jakabovitz*, 24 F.3d at 385, 388 n. 16 (property owners liable for brokers' discrimination); *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992), *cert. denied*, 510 U.S. 812, 114 S. Ct. 58, 126 L.Ed.2d 28 (1993) (apartment owner liable for discriminatory acts of his property manager); *City of Chicago v. Matchmaker*, 982 F.2d at 1096-97 (real estate brokerage firm liable for racial steering by its agents; owner and chief executive officer of firm personally liable); *Marr v. Rife*, 503 F.2d at 741-42 (proprietor of real estate brokerage firm personally liable for discriminatory acts of his sales agent); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 649 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975) (owners and property supervisors liable for discriminatory acts of rental agents); *Sanborn v. Wagner*, 354 F. Supp. 291, 295 (D. Md. 1973) (real estate broker doing business as a real estate brokerage company liable for the discriminatory acts of company sales agent); *United States v. Mitchell*, 335 F. Supp. 1004 (N.D. Ga. 1971), *aff'd, United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826, 94 S. Ct. 131, 38 L.Ed.2d 2159 (1973) (real estate brokers liable for discriminatory acts of their salespersons).

In imposing liability, the lower federal courts have focused on the nature of an agency relationship – the right of the principal to direct and control the agent. Under common law principles of vicarious liability, as set forth in the Restatement, "[a]gency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement § 1. A master-servant relationship is a form of agency in which the master employs the servant as "an agent to perform service in his affairs" and "controls or has the right to control the physical conduct of the other in the performance of the service." Restatement § 2. Key to the Restatement definitions of principal-agent and master-servant relationships is that the principal and master *control or have the right to control* the conduct of the agent and servant.

This important principle has been long recognized in Fair Housing Act litigation. *See, Cabrera v. Jakabovitz*, 24 F.3d at 387 (sufficient evidence of agency where landlords controlled relations with brokers); *City of Chicago v. Matchmaker*, 982 F.2d at 1098 (chief executive and sole owner of real estate firm liable where he supervised the day-to-day operations of firm and agents); *Marr v. Rife*, 503 F.2d at 742 ("[a]s owner of the agency, Rife had at least the power to control the acts of his salesmen").

The Restatement further provides that a master is subject to liability for the torts of his servants committed while acting in the scope of their employment. Restatement § 219. Moreover,

> [a] master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion.

Restatement § 216 ("Unauthorized Tortious Conduct"). The comment to section 216 elaborates:

> A principal is often subject to liability for the unauthorized conduct of an agent with respect to matters which, under the agreement creating the relation, he has the right to direct. . . . [L]iability is normally based upon the fact that the tort is brought about in the course of an undertaking for the benefit, and subject to the right, of the principal to control his servant or other agent.

Restatement § 216 comment (a). The Second Circuit has pointed out the need for such a rule under the Fair Housing Act, stating that "[i]t would be too easy for the broker or owner to plead ignorance when an agent was caught and it would be unfair to only punish a manager or agent for what the owner or employer should have controlled and trained the employee to avoid." *Cabrera v. Jakabovitz*, 24 F.2d at 389 (quotation omitted).

In this case, the court of appeals applied similar agency principles. Meyer admits that he has ultimate responsibility for the activities of Triad, but claims he performed his duties as corporate *president* and designated *officer/broker* "through" Grove Crank, whom plaintiffs allege committed the discriminatory housing

practices.[3] Record 27 at 127; Record 28 at 8. In its opinion, the court of appeals found that Meyer may be subject to liability under the Fair Housing Act in his capacities as *sole owner* of Triad, *president* of Triad, and as the designated *officer/broker* of Triad. 258 F.3d at 1135-36; Pet.App. at 16. The court of appeals based its decision on each of these three bases for liability on Meyer's right to control the activities of the Triad salespersons – not on the basis of strict liability as Meyer claims. Although in its opinion the court of appeals used the term "non-delegable" in describing the duty not to discriminate in violation of the Fair Housing Act, it is clear that each of its findings was made on the ground that there was sufficient evidence of an agency relationship between Meyer and Crank and the Triad salespersons based on Meyer's right to direct or control their activities. Thus, Meyer's claim that the court of appeals used a non-delegable duty analysis as a means by which to escape the confines of vicarious liability is meritless. (Pet. at 7, 15.)

With respect to liability for discriminatory housing practices based upon his role as the *sole owner* of Triad, the court of appeals held that "[i]f Meyer solely owned the agency, he had at least the authority to control the acts of his salespersons, particularly in light of his position as president and officer/broker of Triad." 258 F.3d at 1133; Pet.App. at 10-11. In so holding, the Ninth Circuit followed similar decisions by the Seventh, Sixth and Fourth Circuits imposing liability on the sole owners of

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[3] Meyer also claimed that Grove Crank was the owner of Triad at the time of the discriminatory housing practices, which plaintiffs contest. 258 F.3d at 1133 n.4; Pet.App. at 9 n.4.

real estate brokerage firms – corporate and sole proprietorships – and found that "[t]he overriding societal priority of the FHA indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and to ensure that similar harm will not occur again." 258 F.3d at 1132; Pet.App. at 7. *See City of Chicago v. Matchmaker*, 982 F.2d at 1096-98; *Walker v. Crigler*, 976 F.2d at 904-905; *Marr v. Rife*, 503 F.2d at 742. Thus, the court of appeals correctly found that the district court had erred in holding that Meyer, as a matter of law, could not be liable in his capacity as *sole owner* of Triad.

With respect to liability for discriminatory housing practices based upon his role as the *president* of Triad, the court of appeals held that "as an officer of the company he actually did direct or control, or had the right to direct or control, the conduct of the salespersons who allegedly discriminated against the Holleys with respect to the sale of real estate." 258 F.3d at 1133; Pet.App. at 11. In his petition, Meyer seeks to frame the issue of corporate officer liability before this Court as a simple choice between strict liability versus liability only for acts of discrimination personally committed by a corporate officer. Pet. at 7, 12-15.

Meyer further contends that a finding of liability against him in his status as *president* of Triad would require the imposition of strict liability on him merely because of his status since plaintiffs fail to allege that he had any personal involvement in the alleged discrimination. Pet. at 7. Amicus curiae CAR makes a related claim that the court of appeals' opinion "has interpreted the policy of the fair housing law to state that an innocent person should be held responsible for violations of the

fair housing law solely due to that person's ownership in a corporation or that person's position as a corporate broker-officer under state licensing law." Brief of Amicus Curiae CAR ("Amicus Brief") at 7. CAR claims that "[p]ublic policy dictates that [the corporate structure] be permitted to continue in form and substance in the absence of an overriding wrong, *such as when the owner or officer of the company commits or authorizes misconduct or established policies that allow such misconduct to flourish.*" Amicus Brief at 8-9 (emphasis added). None of these arguments has any merit in this case.

Meyer claimed that he was exercising his duties as *president* of Triad "through" Grove Crank. Record 27 at 127; Record 28 at 8. As described more fully below, as the designated *officer/broker* of Triad, Meyer had duties of supervision and control over the activities of the Triad salespersons. *See* Part III below. Meyer's complete abdication of his duty to supervise the sales activities of the Triad salespersons is not "non-involvement" with the alleged acts of discrimination as he claims. Moreover, even the cases cited by Meyer state that actionable wrongful conduct of an officer may include an omission. Pet. at 13. *See Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980) (corporate officer liability may be imposed based upon act of omission); *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406, 409 (10th Cir. 1958) (same). *See also Hagemeyer Chemical Co., Inc. v. Insect-O-Lite, Inc.*, 291 F.2d 696, 699 (6th Cir. 1961) (officers, directors and shareholders of a corporation may be held liable for acts of agent of corporation if there was passive participation in conduct). In this case, Meyer's act of omission was his utter failure to supervise, direct and

control the activities of Triad's salespersons as required by the real estate licensing laws. Meyer also failed to set policies regarding fair housing training and compliance, which could certainly be found to "allow such misconduct to flourish" as described by CAR. Here, Meyer and CAR fail to address the fact that this case involves a professional real estate corporation and that Meyer had professional duties as the designated *officer/broker*, which distinguishes it from a lawsuit against typical corporate officers seeking to hold them personally liable for the acts of the corporation's employees. As described below in Part III, Meyer undeniably had the duty to direct and control the Triad salespersons in his position as designated *officer/broker* of Triad.

Thus, Meyer's claim of being held strictly liable as an "innocent" corporate officer is simply not borne out by the facts of this case. The court of appeals correctly found that the district court had erred in holding that Meyer, as a matter of law, could not be liable in his capacity as *president* of Triad. These facts bring this case squarely within the Restatement's provisions regarding common law vicarious liability.

III

THE PETITION SHOULD BE DENIED BECAUSE IT DISREGARDS THE OTHER SIGNIFICANT BASIS FOR THE COURT OF APPEALS' DECISION – MEYER'S ROLE AS THE DESIGNATED OFFICER/BROKER OF TRIAD.

As mentioned above, the court of appeals' decision that Meyer may be found liable under the Fair Housing Act also rests on his position as the designated *officer/*

broker of Triad under the California licensing scheme. 258 F.3d at 1134-35; Pet.App. 12-15. Specifically, the court of appeals held that "Meyer's undisputed responsibility to supervise Triad's salespersons in real estate transactions places him squarely within HUD's regulatory history allowing complaints against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling." 258 F.3d at 1135; Pet.App. at 14.[4]

Meyer's professional broker qualifications and agreement to supervise the Triad real estate salespersons in his role as designated *officer/broker* served as the basis for the State of California's licensure of Triad. *See* Cal. Bus. & Prof. Code §§ 10130, 10131, 10159.2, 10211 and Cal. Code of Reg. 2725, the text of which is reproduced in the Appendix hereto. According to the California licensing scheme, the corporate officer designated by a corporate broker licensee pursuant to California Business and Professions Code section 10211

> shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

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[4] Although the court of appeals reviewed the California licensing scheme, it made clear that it was applying federal agency law, not California licensing law, to determine liability in this case. 258 F.3d at 1134; Pet.App. at 12.

Cal. Bus. & Prof. Code § 10159.2; App. at 3. Without a licensed officer of a corporation – in this case Meyer – the corporation cannot perform activities requiring a real estate broker's license. *Amvest Mortgage Corp. v. Antt*, 58 Cal.App.4th 1239, 1243 & n. 4, 68 Cal.Rptr.2d 457 (1997).

The California Code of Regulations implementing the Business and Professions Code sections regarding real estate brokers and salespersons, further requires that

> [a] broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage: (a) [t]ransactions requiring a real estate license; . . . (f) familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination.

10 Cal. Code Reg. § 2725; App. at 4-5. The broker must also "establish a system for monitoring compliance with such policies, rules, procedures and systems." *Id.* Although a broker is allowed to use the services of brokers and salespersons to assist in administering such policies and systems, the broker may not "relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker." *Id.*

As the court of appeals correctly found, "Meyer may have neglected his duties to supervise salespeople in their real estate transactions, which included his responsibility to ensure that they follow federal and state anti-discrimination laws." 258 F.3d at 1134; Pet.App. at 12. The facts of this case show that "Meyer's undisputed responsibility to supervise Triad's salespersons in real estate

transactions places him squarely within HUD's regulatory history allowing complaints against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling." 258 F.3d at 1135; Pet.App. at 14. That undisputed responsibility also puts him squarely within the Restatement's definition of master as one who "controls or has the right to control the physical conduct of the other in the performance of the service." Restatement § 2. Thus, the vicarious liability imposed in this case rests firmly on the traditional grounds for such liability. For these reasons, the petition should be denied.

IV

THE ISSUES RAISED IN THIS CASE ARE NOT OF NATIONAL IMPORTANCE, NOR IS THERE ANY REAL DISAGREEMENT IN THE LOWER COURTS ON THE APPLICABLE STANDARDS.

Meyer last argues that his petition should be granted because the case is of exceptional national importance. Pet. at 17-18. As discussed above, the court of appeals followed well-established rules of vicarious liability in refusing to hold, as a matter of law, that Meyer could not be vicariously liable for the discriminatory conduct of the Triad salespersons. Certiorari should not be granted unless there are compelling reasons. Sup. Ct. R. 10. Cases that involve application of well-settled principles to a familiar situation and have little significance except to the parties are not appropriate for review by this Court. *Powell v. Nevada*, 511 U.S. 79, 114 S. Ct. 1280, 128 L.Ed.2d 1 (1994) (Thomas, J., dissenting). Although this case is of importance to the parties, it has no national significance.

Meyer's concern that "corporate real estate giants that may hire thousands of agents nationwide" will be negatively impacted by the decision of the court of appeals is misplaced. This case does not, as Meyer would have it, impose strict liability on an innocent corporate officer because of his position. It merely holds that liability may be imposed against an individual who is the *sole owner, president* and/or designated *officer/broker* of a small real estate office. Whether or not Grove Crank was in fact acting as the agent of Meyer in each of those capacities, and whether he was acting within the scope of that agency, are facts that have not yet been litigated and the record is not complete.

Amicus CAR's claim that the court of appeals' decision "threatens to precipitate much upheaval and restructuring in the real estate industry" likewise should be rejected. Amicus Brief at 4. The leading cases imposing liability on the sole owners, corporate officers and brokers of real estate firms were decided years ago. Twenty-five years ago the Sixth Circuit decided *Marr v. Rife*, 503 F.3d 735, imposing liability on the owner of a small real estate firm for the discriminatory acts of his salespersons although he was not involved. Ten years ago the Seventh Circuit decided *City of Chicago v. Matchmaker*, 982 F.2d 1086, imposing liability on the sole shareholder, chief executive officer and supervisor of a corporate real estate firm for the discriminatory acts of the corporate salespersons although he was not involved. Given the long existence of these cases, and no disagreement between the circuits on the issue, the claims of Meyer and CAR are exaggerated.

Ultimately, agency is a question for the factfinder. *Harris v. Itzhaki*, 183 F.3d at 1054; *Cabrera v. Jakabovitz*, 24 F.3d at 386. The question of fact is whether a particular defendant had the right to direct and control the actions of another with respect to the sale or rental of a dwelling or the provision of real estate brokerage services, and whether a discriminatory housing practice committed by that other person was within the scope of his authority as the employee or agent of the defendant. A finding of agency must be made based on the specific facts of the case. Each future case will have to be decided on its own facts, as will this case on remand.

In this particular case, the evidence presented by respondents supports a finding that Meyer had the right, and indeed the duty, to direct and control the corporate salespersons at Triad, and thus the court of appeals was correct in finding that respondents had alleged and presented sufficient facts to withstand Meyer's motion to dismiss and motion for summary judgment on the issue of agency.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Honorable Court deny the petition.

Respectfully submitted,

ELIZABETH BRANCART
Counsel of Record
CHRISTOPHER BRANCART
BRANCART & BRANCART
P.O. Box 686
Pescadero, California 94060
(650) 879-0141

GREG ALEXANIAN
THE LAW OFFICE OF GREG ALEXANIAN
10154 Riverside Drive
Toluca Lake, California 91602
(818) 760-3386

Attorneys for Respondents
Emma Mary Ellen Holley;
David Holley; Michael Holley,
a minor; Brooks Bauer,
individually and on behalf
of the general public

APPENDIX

California Business & Professions Code § 10130. ***Necessity of license; complaints for violations; prosecutor***

It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a real estate license from the department.

The commissioner may prefer a complaint for violation of this section before any court of competent jurisdiction, and the commissioner and his counsel, deputies or assistants may assist in presenting the law or facts at the trial.

It is the duty of the district attorney of each county in this state to prosecute all violations of this section in their respective counties in which the violations occur.

(West 2002) [Effective 1969]

California Business & Professions Code § 10131. ***Real estate broker***

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of,

solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

(e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

(West 2002) [Effective 1984]

California Business & Professions Code § 10159.2. ***Responsibility of officer in charge for performance of acts for which real estate license required***

(a) The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

(b) A corporate broker licensee that has procured additional licenses in accordance with Section 10158 through officers other than the officer designated pursuant to Section 10211 may, by appropriate resolution of its board of directors, assign supervisory responsibility over salespersons licensed to the corporation to its broker-officers.

(c) A certified copy of any resolution of the board of directors assigning supervisory responsibility over real estate salespersons licensed to the corporation shall be filed with the Real Estate Commissioner within five days after the adoption or modification thereof.

[West 2002) [Effective 1980]

California Business & Professions Code § 10211. ***Corporation license***

If the licensee is a corporation, the license issued to it entitles one officer thereof, on behalf of the corporation, to engage in the business of real estate broker without the payment of any further fee, such officer to be designated in the application of the corporation for a license. For each officer other than the officer so designated, through whom it engages in the business of real estate broker, the appropriate original or renewal fee is to be paid in addition to the fee paid by the corporation.

(West 2002) [Effective 1956]

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10 California Code of Regulations § 2725. ***Broker Supervision.***

A broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage:

(a) Transactions requiring a real estate license.

(b) Documents which may have a material effect upon the rights or obligations of a party to the transaction.

(c) Filing, storage and maintenance of such documents.

(d) The handling of trust funds.

(e) Advertising of any service for which a license is required.

(f) Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination.

(g) Regular and consistent reports of licensed activities of salespersons.

The form and extent of such policies, rules, procedures and systems shall take into consideration the number of salespersons employed and the number and location of branch offices.

A broker shall establish a system for monitoring compliance with such policies, rules, procedures and systems. A broker may use the services of brokers and salespersons to assist in administering the provisions of this section so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker.

(2002) [Effective 1996]

Supreme Court, U.S.
FILED
APR 24 2002

(5)

No. 01-1120

In The

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

BROWN & PEEL
JAMES W. PEEL
3585 West Beechwood
Suite 101
Fresno, California 93711
(559) 431-1300

BENEDON & SERLIN
DOUGLAS G. BENEDON*
GERALD M. SERLIN
21700 Oxnard Street
Suite 1290
Woodland Hills, California 91367
(818) 340-1950
*Counsel of Record

Attorneys for Petitioner David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

In its published decision, the Ninth Circuit confuses and misapplies on one hand the well-established doctrines that a corporation may be vicariously liable under respondeat superior and the non-delegability of the duty to comply with the Fair Housing Act, with on the other hand the far different issue of the personal liability of the corporation's owner(s) and officers for the acts of the corporation or its agents. The result is a decision which imposes absolute *personal* liability on corporate owners and officers for an employee's or agent's violation of the Fair Housing Act, regardless of whether or not they personally directed, authorized, or were even aware of the particular acts that occurred. The consequence is catastrophic for all aspects of the real estate industry nationwide.

In his petition, Meyer demonstrated why this Court's review is necessary to resolve the conflict between the Ninth Circuit's decision in this case, and decisions which hold quite directly and clearly that corporate owners and officers are *not* personally liable, absent additional facts related to their direction, authorization, or ratification of the agent's conduct.

In this reply, Meyer explains why each of the arguments asserted by Plaintiffs in their opposition is without merit.

LEGAL DISCUSSION

I.

THE COURT OF APPEALS IMPROPERLY PREMISED PERSONAL LIABILITY OF A CORPORATE OWNER OR OFFICER SOLELY ON THE RIGHT OF CONTROL.

Plaintiffs devote substantial effort in their opposition to demonstrate an uncontested point: owners and officers

of a corporation exercise a right of control over the corporation's agents and employees. For this reason, the *corporation* can be vicariously liable for the torts of its agents and employees. From this premise, Plaintiffs, like the court of appeals, make a leap to conclude that, based *solely* on this right of control, the owner or officer of a corporation can be *personally* liable for the torts of the corporation's agents or employees, whether or not they personally directed, authorized, or were even aware of the acts that occurred. Here, Plaintiffs' analysis, like that of the court of appeals', falters.

To bridge the gap between corporate and personal liability, the court of appeals relied on the doctrine of "non-delegable duty." As explained in the petition, the court of appeals misapplied this doctrine by holding it supercedes established rules of agency law, which require specific acts by the individual officer before personal liability will adhere. See, Pet. at 12-15; see also, amicus brief of the National Association of REALTORS® ("NAR") at 13-19. Plaintiffs, importantly, make no attempt to legitimatize the court of appeals' reliance on this doctrine. Instead, they claim the doctrine was not the basis of, and was unnecessary for, the court of appeals' ruling. Plaintiffs' claim fails for several reasons.

First, Plaintiffs assert:

> "Although in its opinion the court of appeals used the term 'non-delegable' in describing the duty not to discriminate in violation of the Fair Housing Act, it is clear that each of its findings was made on the ground that there was sufficient evidence of an agency relationship between Meyer and Crank and the Triad salespersons based on Meyer's right to direct or control their activities. Thus, Meyer's claim that the court of appeals used a non-delegable duty analysis as a means by which to escape the

> confines of vicarious liability is meritless." Opp. at 17.

The court of appeals' reliance on the doctrine of "non-delegable duty" is in fact manifest throughout the opinion. For example, in setting forth the legal basis for Meyer's personal liability as a corporate owner:

> "While the evidence does not indicate that Crank acted with the approval or at the direction of Meyer, such a finding is not necessary to hold Meyer liable as the sole owner of Triad for breach of a non-delegable duty to comply with the FHA." 258 F.3d 1127, 1133.

Similarly, the court of appeals concluded Meyer's personal liability as a corporate officer could be based on his non-delegable duty:

> "[B]ecause the duty not to discriminate is a non-delegable one, we join other courts in holding that officers can be individually liable for discriminatory acts of corporate employees under their control and management." 258 F.3d at 1134.[1]

Thus, contrary to Plaintiffs' assertion, the court of appeals' decision expanding personal liability of corporate owners and officers regardless of fault cannot be

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[1] One of the "other courts" cited by the Ninth Circuit was the Fifth Circuit Court of Appeals' decision in *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348 (5th Cir. 1979). 258 F.3d at 1134. In *Northside*, the court of appeals upheld a contempt judgment against a real estate corporation and two of its officers for violation of an injunction prohibiting discriminatory housing practices. Importantly, the judgment against the officers was based not on the doctrine of non-delegable duty, nor on the officers' right of control, but on the evidence adduced at trial demonstrating, inter alia, that the officers expressly ordered sales agents to engage in discrimination, and ordered two agents fired for not discriminating. 605 F.2d at 1354.

divorced from its erroneous application of the doctrine of non-delegable duty.

Second, Plaintiffs assert the court of appeals properly concluded that liability of a corporate owner or officer under the FHA can be based *solely* on the owner or officer's right to control the corporation's agents. Opp. at 17-20. This is not, nor should it be, the law. A corporation, although a separate legal entity, can only act through its designated officers. For this reason, the corporation's officers must have the right to control the corporation's agents. Personal liability of the owners and officers, however, cannot be based solely on this right of control. To do so would render the entire corporate structure meaningless and make personal liability limitless.

For this reason, under well-established rules of agency, a corporate officer will not be held personally liable, merely by virtue of his office, for the torts of his corporation or its other agents. Rather, liability must be founded upon specific acts by the individual officer. See, *Lobato v. Pay-Less Drug Stores*, 261 F.2d 406, 409 (10th Cir. 1958); *Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 1141, 1144 (4th Cir. 1975); *Escudo Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980); *Murphy Tugboat v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 852 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256, 1263 (9th Cir. 1981); see also, 18B Am.Jur.2d, Corporations, §§ 1877-78.

This fundamental principle of agency and corporation law has been applied regularly to claims brought under the FHA, and those courts which have expressly considered the issue in this context have underscored the need for the owner's or officer's personal participation in torts committed by the corporation or its agents in order for liability to be personally imposed on the owner or officer. See, e.g., *Tillman v. Wheaton-Haven Recreation*

Ass'n, supra, 517 F.2d at 1144; *United States v. Lorantffy Care Center*, 999 F.Supp. 1037, 1045 (N.D. Ohio 1998); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232, 1303-04 (N.D. Ohio 1983); see also NAR amicus brief at 8-13.

The FHA itself neither defines – nor purports to expand – the class of persons who can be sued for alleged discriminatory housing practices. 42 U.S.C. § 3601, *et seq.*[2] Specifically, the FHA does not make corporate owners or officers liable for the torts of the corporation's agents based solely on a right to control. Notably, when Congress has sought to expand personal liability to corporate owners and officers for the wrongs of the corporation it has specifically done so. For example, in the context of antitrust law, 15 U.S.C. § 24 provides in relevant part:

> "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation. . . ."

Congress has demonstrated no such expansionist intent in the FHA. It should not be read into the statute by the courts.

Third, Plaintiffs fail to offer any argument to counter Meyer's showing that the court of appeals' expansion of liability is not warranted by the policy underlying the FHA to prevent discrimination in housing. Pet. at 16-17. A plaintiff is not without recourse under established rules of tort and agency for the alleged discrimination. He or

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[2] The relevant provisions of the FHA – 42 U.S.C. §§ 3610, 3612, and 3613 – are reprinted in the Appendix to the Petition at 41-61.

she can pursue their action against the agent who is directly responsible for the alleged discrimination. Additionally, they can pursue the agent's principal, the corporation, the "one innocent party with the power to control the acts of the agent." *Walker v. Crigler*, 976 F.2d 900, 904-05 (4th Cir. 1992). No legitimate purpose is furthered by allowing a plaintiff to pursue an innocent corporate owner/officer personally as well.

This is demonstrated by the present case, where Plaintiffs' motivation for pursuing Meyer is transparent. Plaintiffs apparently believe that because the corporation's insurance policy excludes coverage for discrimination claims they have been left without a remedy. Plaintiffs' contention they should be allowed to proceed against Meyer because he is a perceived "deep pocket" is repugnant, and in no way furthers the actual laudable policy underlying the FHA.

II.

THE DESIGNATED OFFICER/BROKER OF A CORPORATION IS NOT PERSONALLY LIABLE FOR THE ACTS OF THE CORPORATION OR ITS AGENTS.

A licensed broker, under whose license employees or agents operate, may be liable for the discriminatory actions of those employees or agents. *Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *Heights Community Congress v. Hilltop Realty, Inc., supra*, 629 F.Supp. at 1303. Thus, in *Hilltop*, the court held that a licensed broker, in that case a corporation, was "liable for the imputed acts and statements" of those agents operating under the corporation's license in violation of the FHA. 629 F.Supp. at 1303. The Plaintiffs also sought to attach personal liability to the owner/president of the corporation. The court held that, since the agents who committed the discriminatory acts had a "contractual relationship with [the corporation] as

broker and not with [the owner/president] as broker, [the agent's] acts and statements could not be imputed to [the owner/president]." *Id.*, at 1303-04.

In the present case, Meyer submitted evidence which established that he had not held a broker's license as an individual since the early 1980's, i.e., well before the incidents alleged in Plaintiffs' complaint. E.R. p. 48; Supp. E.R. pp. 1-4. From August 1994 through August 1998, Triad was a corporate licensee, with Meyer designated as Triad's officer/broker. Meyer's broker's license was thus valid only as an officer of Triad. E.R. pp. 48-49, 53. Since at least 1994, all of Triad's agents were employed by Triad, and operated under its broker's license. E.R. 55-56, 60.

This evidence established that none of the alleged discriminatory acts were committed by an agent acting under Meyer's individual broker's license. Accordingly, Meyer was properly granted judgment by the district court. *Heights Community Congress v. Hilltop Realty, Inc., supra*, 629 F.Supp. at 1303. Nonetheless, the court of appeals found, and Plaintiffs now argue, that Meyer can be personally liable for the torts of the corporation based solely on his status as the corporation's designated officer/broker. 258 F.3d at 1134-35; Opp. at 20-23. This is incorrect.

The court of appeals' finding, and Plaintiffs' argument, are based on California's statutory scheme for corporate brokers. California Business and Professions Code section 10159.2 provides in relevant part:

> "The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the

> provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required."

This statute does not create a private right of action against an individual based solely upon his status as a designated broker. Rather, section 10159.2 is intended "to include only disciplinary sanctions on the individual broker. Nothing in the statutory scheme of the Real Estate Act, or the plain language of [section] 10159.2, suggests that it creates a private right of action against the designated broker, particularly in light of detailed provisions for disciplinary sanctions set forth in [sections] 10175-10185. The most obvious interpretation of [section] 10159.2 is that it simply extended this disciplinary scheme to apply against designated brokers who failed to properly supervise employees. [Citation.]" *In re Grabau*, 151 B.R. 227, 332 (1993); see also, *Walters v. Marler*, 83 Cal.App.3d 1, 35 (1978) ("Any action by the qualifying broker . . . must be regarded as an action by the corporation and not by the broker as an individual").

Grabau and *Walters* are perfectly consistent with the manner in which the courts, up to this point, have addressed the issue of a broker's liability under the FHA. A broker under contract with its agents has a nondelegable duty to obey the FHA. *Marr v. Rife, supra,* 503 F.2d at 741; *Heights Community Congress v. Hilltop Realty, Inc., supra,* 629 F.Supp. at 211. Yet, under the court of appeals' decision, that is precisely what the California statutory scheme would do by "delegating" the broker's duty to supervise and control to an agent of the corporation, i.e., the designated broker. A more logical interpretation, and one supported by the law, is that the broker under whose license the agents operate – here, undisputably Triad – is the person vicariously liable to third parties for violations of the FHA by the broker's

agents. See, *Hilltop, supra,* 629 F. Supp. at 212 ("Hilltop Realty is liable for the imputed acts and statements of those agents who participated in [the violations of the FHA]. However, since the agents in those violations have a contractual relationship with Hilltop as broker and not with [the corporation's president], their acts and statements may not be imputed to him under *Marr v. Rife*").

In sum, the undisputed evidence established that the real estate license was issued to Triad, with Meyer as the designated corporate officer for Triad. Crank, indeed all Triad agents, were employed by, and licensed as salespersons for, Triad. Therefore, because Triad was the licensed broker, Crank's contractual relationship was with Triad, not Meyer. Thus, Crank's alleged discriminatory acts are imputed to Triad as the broker, and not to Meyer as an individual. Accordingly, Meyer cannot be held personally liable for Crank's alleged misconduct in violation of the FHA. Summary judgment for Meyer was correct and should be affirmed.

III.

THE COURT OF APPEALS' EXPANSION OF LIABILITY IS AN ISSUE OF NATIONAL IMPORTANCE WARRANTING REVIEW BY THIS COURT.

Plaintiffs characterize the court of appeals' expansion of liability for corporate owners and officers as having "no national significance." Opp. at 23. Plaintiffs are incorrect in this assertion.

As demonstrated in detail by amicus curiae, the NAR and the California Association of REALTORS® ("CAR"), the ramifications of the court of appeals' published opinion extend far beyond the catastrophic consequences to Meyer, to the entire real estate industry nationwide. Under the court of appeals' decision, each owner or officer of a real estate corporation – from tiny "Mom and

Pop" operations to national corporate giants – is going to be *personally* liable for the acts of the corporation's agents in violation of the FHA, whether or not they directed, authorized, or even knew of the agent's conduct.

This holding will, without exaggeration, undermine the corporate structure of the entire real estate industry, and open the floodgates of litigation against corporate owners and officers. Such a holding compels further scrutiny by this Court before becoming the law of the nation.

CONCLUSION

For the reasons set forth in the petition and in this reply, Petitioner prays for a writ of certiorari to issue to the Court of Appeals for the Ninth Circuit.

Dated: April 24, 2002

Respectfully submitted,

BROWN & PEEL
JAMES W. PEEL

BENEDON & SERLIN
DOUGLAS G. BENEDON
GERALD M. SERLIN

Attorneys for Petitioner,
David Meyer, individually and
in his capacity as president and
designated officer/broker of Triad,
Inc., dba Triad Realtors

Supreme Court U.S.
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(2)

No. 01-1120

In The

Supreme Court of the United States

DAVID MEYER, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT AND DESIGNATED OFFICE/BROKER OF TRIAD, INC., DOING BUSINESS AS TRIAD REALTORS,

Petitioners,

v.

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, AND BROOKS BAUER, INDIVIDUALLY AND ON BEHALF OF THE GENERAL PUBLIC,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF AMICUS CURIAE CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JUNE BABIRACKI BARLOW, ESQ.
Vice President and General Counsel
Counsel of Record
NEIL KALIN, ESQ.
Assistant General Counsel
CALIFORNIA ASSOCIATION OF REALTORS®
525 South Virgil Avenue
Los Angeles, California 90020-1403
(213) 739-8200

Counsel for Amicus Curiae, California Association of Realtors®

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2098

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I.

BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the California Association of REALTORS® (hereinafter, "CAR") submits this brief in support of the petitioner, David Meyer, in his Petition for Writ of Certiorari.

II.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1] AND INTRODUCTION

CAR is a non-profit, voluntary, trade association incorporated in California whose members consist of local Boards and Associations of REALTORS®, and approximately 100,000 persons licensed as real estate brokers and salespersons by the State of California, as well as affiliate members such as real estate appraisers, title insurers, mortgage lenders, and real estate attorneys. CAR is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate, the protection of private property rights, and the regulation of, and liability related to, licensed real estate activity.

---

[1] The parties have consented to the filing of this brief. The letter of consent is on file with the Clerk of the U.S. Supreme Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

CAR actively supports fair housing objectives and maintains an Equal Opportunity-Cultural Diversity committee. The mission of the CAR Equal Opportunity-Cultural Diversity committee is to, in conjunction with local Boards of REALTORS®, design, promote and implement the Association's programs in the areas of minority outreach, fair housing, affirmative marketing, fair lending practices, and cultural awareness. The committee also monitors and evaluates legislative, legal and regulatory trends in issue areas related to equal access to shelter for all individuals.

While the California Association of REALTORS® actively promotes fair housing and abhors illegal discrimination, this case stands for a proposition that goes far beyond typical notions of vicarious responsibility. By creating a new test of holding a shareholder and broker-officer of a corporation liable, absent any facts giving rise to individual liability, the case uses a theory of closeness to the perpetrator and guilt by association to distort the federal fair housing law to assure recovery by the victim. Such notions of liability by wealth and association are antithetical to the tenets of the fair housing laws and do not support the underlying rationale of prevention or punishment of a culpable party and its real estate firm. The interpretation also creates a situation of requiring careful law abiding brokers to choose between following the licensing laws, including good prevention and training policies in supervising salespersons, and putting themselves personally at risk for acts over which there is no practical control.

Plaintiff alleges that an individual real estate salesperson (Crank) working for a real estate broker corporation (Triad, Inc.) unlawfully discriminated against the Holley plaintiffs in their efforts to buy a home by not presenting an offer to the developer and uttering racial epithets. The seller also brought suit alleging unlawful discrimination because the developer wanted to sell a new home to the couple. Crank, the salesperson, and Triad, Inc., the real estate brokerage firm, were sued. Attempting to maximize chances of monetary recovery, plaintiffs later expanded their suit to include defendant David Meyer, the sole owner and officer of Triad, Inc., in his individual capacity. The District Court dismissed the claim against Meyer concluding that Crank's discriminatory acts could be imputed to Triad but not to Meyer as an individual.

Plaintiffs appealed to the Ninth Circuit Court of Appeals which sidestepped well-established corporate law and used an expansionist construction to hold that the federal Fair Housing Act makes Meyer, solely due to his position as an owner and officer of the corporate brokerage firm, personally liable for fair housing violations committed by an employee of a corporation he owned. To do this, the Ninth Circuit Court of Appeals relied on an outdated regulation issued by the Department of Housing and Urban Development to broaden the scope of the fair housing law well beyond, if not in contradiction to, established law in other circuits. (See Petitioner's Writ, pages 9-17 for a discussion distinguishing the applicable federal cases.) In short, its holding, absent a thorough analysis of the traditional rules governing personal liability of corporate directors, officers or

shareholders, exposes those who own a corporation to individual liability absent personal involvement. Due to the common business structures used by real estate brokerage firms in California this ruling threatens to precipitate much upheaval and restructuring in the real estate industry.

III.

THE NINTH CIRCUIT RULING, WHICH SWEEPS ASIDE WELL-ESTABLISHED CORPORATE LAW TO BENEFIT A PARTICULAR PLAINTIFF, DOES NOT PROMOTE THE PUBLIC INTEREST.

Most real estate brokerage activities performed on behalf of others in California require a real estate broker's license from the California Department of Real Estate.[2] In California, either an individual or a corporation may hold a broker's license.[3] A corporation may hold a real estate brokerage license providing it designates a licensed broker as a real estate officer who can act on behalf of the corporation.[4] This person, the corporate broker-officer, must complete the same education requirements as any other broker.[5] However, the corporate entity itself actually conducts the brokerage activity and holds the separate corporate license. In contrast, only an

[2] California Business and Professions Code, section 10130.

[3] California Business and Professions Code, sections 10131, 10211, 10158.

[4] California Business and Professions Code, section 10211.

[5] California Business and Professions Code, section 10171.5.

individual may hold a salesperson's license.[6] A licensed real estate salesperson may not work independent of a broker,[7] but is only licensed to act through a broker, whether that broker holds a corporate or an individual broker's license.

Structuring a California real estate broker business as a corporation is a common phenomenon. In California alone there are more than 15,000 corporate real estate broker licensees and just over 17,000 individuals licensed as corporate broker-officers. Furthermore, 94,000 individuals licensed as real estate salespersons work for a corporate broker.[8] According to the California Department of Real Estate website,[9] as of October there were 107,258 real estate broker licensees and 205,921 real estate salesperson licensees. Thus, even though corporate licensees represent only 14% of all licensed brokers in California, a full 45% of all real estate salespersons work for these corporate brokers. Accordingly, the decision by the Ninth Circuit has the potential to not only affect the 17,000 corporate broker-officers but also nearly half of all real estate salespeople in California.

It is to be expected that if a salesperson unlawfully discriminates, the salesperson, the corporation and other persons who were specifically involved in the act would

[6] California Business and Professions Code, section 10132.

[7] California Business and Professions Code, section 10132.

[8] Telephone Interview with Thomas Hensley, Licensing Manager, California Department of Real Estate (December 11, 2001).

[9] http://www.dre.ca.gov/stats01.htm

be held liable under the fair housing laws. If the corporate owner or officer is guilty of direct violations, a proper interpretation of the law reaches that wrongdoer as well. As with any corporation, a real estate firm is ordinarily vicariously liable for the unlawful conduct of real estate salespersons in its employ, including the wrongful discriminatory acts alleged here. Nor would any corporation expect to be exempt from the scrutiny given to any corporation not respecting the requisite corporate formation, record keeping, and capital requirements. This is not the issue in this case. This case sweeps aside the well established methods of examining the corporation's validity and holds that, as a matter of law, the person who is the sole owner and corporate broker-officer of a real estate brokerage corporation is personally responsible for acts of the salespersons, even though there is no allegation of personal knowledge or involvement. Rather, the premise behind this liability is simply because it is possible that the broker *could* exercise supervision over the offender. The Ninth Circuit has deemed this tenuous connection sufficient under the fair housing laws to reach the innocent owner and officer directly and personally for acts for which he is unaware and did not assist in perpetrating. The consequences of the Ninth Circuit's holding only serve to punish innocents rather than further the purpose of the fair housing laws.

Since the corporate brokerage structure is common in California, individuals relying on the state's valid licensing structure will be presented with a dilemma: Not using the legitimate corporate structure at all and losing all the benefits thereto, or attempting to use the corporate structure and exposing the owner and corporate officer to

personal liability for all acts of those persons working for the corporation, whether or not the owner and officer had knowledge of the illegal act, permitted it to occur or, even worse, took reasonable steps to reduce the risk that improper conduct would take place. Should the Ninth Circuit decision stand, a corporate officer that becomes a broker-officer for purpose of fulfilling the licensing laws that require oversight to be exercised by an individual exposes that person to personal liability by virtue of his position as corporate officer for all the acts of the salespersons with respect to the fair housing laws. In a larger firm, this could be hundreds, and in some cases thousands, of salespersons.

The Ninth Circuit has interpreted the policy of the fair housing law to state that an innocent person should be held responsible for violations of the fair housing law solely due to that person's ownership in a corporation or that person's position as a corporate broker-officer licensed under state licensing law. The apparent purpose of ruling is nothing more than to assure *recovery* by a victim of discrimination. Surely merely augmenting the recovery pool, as opposed to holding the actual and corporate wrongdoer financially and legally responsible for violations of the fair housing laws, cannot represent the true purpose of the legislation.

The Ninth Circuit ruling forces corporate owners and officers to reconsider their business structure. The impact of the ruling, in California alone, can reach thousands of real estate broker licensees, tens of thousands of real estate salesperson licensees and hundreds of thousands of individuals they represent. Those most closely associated with their own business may decide it is no longer

prudent to be the sole owner or to act as a broker-officer for their own firm. Others will be appointed or hired in their place. To protect themselves from the potential legal liability stemming from the Opinion, corporate owners will likely consider an organizational structure that isolates the owner and officer from the business. Some small organizations, similar to the one in this case, may even decide that the strict liability risk attendant to having a number of salespersons in the office is too great and will go out of business or reduce their staff. The decision thus has the potential of not only harming innocent officers but also innocent, responsible salespersons and their clients who have come to rely upon them for needed and valuable real estate services. Rather than increasing responsibility, the decision will have the affect of diluting accountability and even the availability of real estate services.

IV.

DISREGARDING THE CORPORATE ENTITY SHOULD NOT BE PERMITTED WHERE A CORPORATE OWNER OR OFFICE DID NOT COMMIT, AUTHORIZE, OR HAVE KNOWLEDGE OF A WRONGFUL ACT NOR ESTABLISHED POLICIES THAT PERMITTED IT TO OCCUR.

A corporation is a viable and valuable business entity that is recognized and sanctioned by the State of California as a valid business structure in the real estate brokerage business. Public policy dictates that such a structure be permitted to continue in form and substance in the absence of an overriding wrong, such as when the owner

or officer of the company commits or authorizes misconduct or established policies that allow such misconduct to flourish.

The corporate structure is synonymous with the growth, wealth and well being of the American people. Trading in corporations has practically become the American pastime as the New York Stock Exchange (NYSE), American Stock Exchange (AMEX) and National Association of Securities Dealers (NASDAQ) demonstrate. The structure allows businesses to be formed, grow and prosper. Through the corporate structure, small organizations can attract not only monetary capital but also qualified individuals (personnel capital) necessary to effectively compete and succeed in the open marketplace.

The corporate structure does this by reducing the risk associated with business. Rather than risk being unlimited, and thus threatening and intimidating to large and small investors alike, the corporate entity makes the risk limited and thus more inviting. The investor knows that the maximum loss exposure is the money placed into the business venture (and lost profits associated therewith). The officer can take comfort in the knowledge that while one's job, income and perhaps immediate livelihood can be lost due to corporate liability, one's own home, savings and other assets are not subject to personal attack and attachment due to the same corporate liability.

The consumers (be they individuals, businesses or corporations themselves) of corporations' goods or services also, consciously or unconsciously, take advantage of a risk reduction analysis of their own. By dealing with

a corporate entity, the consumer has the benefit of looking to a corporate entity for performance or wrongdoing. The corporation does not have a definite life span, like that of an individual that can be interrupted at any time. The corporation has the advantage of being able to combine assets invested by many rather than the possibly limited assets of an individual or few partners. The corporation may have the advantage of the ability to raise additional monetary capital that an individual does not. The corporate entity has a vested interest in its continued operation whereas declaring forfeiture and starting anew may better serve an individual.

The individual wrongdoer could be made to pay for the unlawful conduct of the individual. The innocent corporation could be made to pay for the unlawful conduct of the individual. If the losses to the corporation are great enough, the owners and investors of the corporation will also, indirectly, pay for the unlawful conduct of the individual. The owners and investors could lose their investment. The owners and investors could lose their income stream generated by the investment. The owners and investors could lose their opportunity to put their investment dollars to more productive use by investing in other businesses or ventures. If the losses to the corporation are great enough, the officers of the corporation will also, indirectly, pay for the unlawful conduct of the individual. The officers could lose their jobs and their reputations, and even their ability to become reemployed in the same line of business elsewhere. The personal toll on the officers could be great indeed.

In this case, none of the traditional basis to disregard the corporate entity (to pierce the corporate veil, so to

speak) and extend liability to Meyer, as an individual, who is an owner and officer of Triad, Inc. have been discussed or even identified by the Court of Appeal. There is no evidence that the corporate entity was established to perpetuate a fraud, circumvent a statute, evade contractual obligations, or accomplish a wrongful act. There is no evidence that the corporation is wholly inadequately capitalized to engage in the real estate business. There is no evidence, through either words or actions that the separate identities of Triad, Inc., the corporation, and Meyer, the individual, have ceased to exist.

The opinion of the Ninth Circuit that blatantly disregards a lawful corporate entity and punishes an innocent owner and officer of the corporation in order to reward a particular plaintiff in a particular case has implications beyond the parties to this Petition. The societal advantages of a corporate structure to owners, investors, officers and consumers are reduced substantially. The risks associated with starting and growing a business that employs one, a few or thousands of individuals, that pays taxes, and that serves a consumer need are increased dramatically. Accountability is decreased and service to the public is thereby effectively limited without an identifiable societal gain or a serious discussion balancing the competing interests.

V.

THE NINTH CIRCUIT OPINION, WHICH FAILS TO GIVE DIRECTION TO CORPORATE OWNERS AND BROKER-OFFICERS, IN LIGHT OF THE REALITIES OF THE REAL ESTATE BROKERAGE BUSINESS, CREATES LIABILITY WITHOUT REGARD TO CAUSE OR CONSEQUENCE.

As stated previously, real estate brokers use many legal business structures such as sole proprietorships, partnerships, and corporations. Some brokers perform all licensed activity through a single individual holding a real estate brokers license. Other brokers perform licensed activity using the services of hundreds or thousands of individuals each holding a real estate salesperson or broker license. Of course there are many variations in between. Many real estate brokerage firms organize as a corporation, whether with sole ownership or with multiple owners. Many REALTORS® have a legal business structure similar to the defendant Meyer. When an individual wholly owns a corporate real estate firm, the same individual is often also the broker holding the corporate broker-officer's license. In California, the broker-officer has a duty to exercise *reasonable* supervision over the activities of his or her salespersons.[10]

The Ninth Circuit recognized this obligation and held, "If Meyer breached that duty to supervise then he should be held accountable for such an omission even absent direct involvement or authorization of Crank's alleged discriminatory conduct." *Holley v. Crank*, 258 F.3d

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[10] California Business and Professions Code section 10159.2, 10 California Code of Regulations, section 2725.

1127, 1135 (9th Cir. 2001). The opinion indicates that Petitioner testified that his responsibilities included making sure that people were treated lawfully (*Holley v. Crank, supra,* at page 1135) but there is an absence of any discussion of what supervisory activity would be sufficient or insufficient to avoid personal liability for activities of the broker-officer's salespersons. Rather, without examining what steps were actually taken by Petitioner or what steps would constitute reasonable supervision in satisfaction of the state licensing requirement, the Ninth Circuit opinion focuses instead on HUD's regulatory history of allowing complaints against individuals who have the *right* to direct or control the conduct of another. *Holley v. Crank, supra,* at 1135.

To better comprehend what obligations satisfy the duty of a broker-officer to reasonably supervise a real estate office, one needs to first understand that a real estate brokerage business is a uniquely personal business. With the advent of technology, it is now possible for buyers and sellers and brokers and agents and lenders and appraisers and inspectors who have never met before, and may never meet again, to come together to transact business. There are computers and software and forms to assist in the transaction. But in the beginning and in the end, real estate is a personal services business. As a result, whether a corporate broker employs one salesperson or one thousand, it is impossible for an owner or officer to be at all places and at all times.

A closer look at the industry will help explain its uniquely personal nature. Brokers, through their real estate agents, meet with buyers and sellers, sometimes in

person, sometimes over the phone and establish relationships. Only through these relationships is a real estate transaction begun, and often kept together, and sometimes undone. Real estate people do not just work in an office from 9:00 a.m. to 5:00 p.m. Real estate people work in the office, out of their homes, out of their client's homes, from their cars, at the golf course, over breakfast, lunch and dinner, with their office phone, with their home phone, with their cell phone, from a desk, from the hood of their car, during the week, during the weekend, morning, noon and night. Wherever people (clients, affiliates, etc.) are and at whatever time, a real estate agent has to be available. Given the nature of the real estate business, an owner or officer of a real estate corporation cannot find a way to minimize the risk of liability exposure under the rule pronounced by the Ninth Circuit.

The Ninth Circuit opinion assumes that a corporate owner, officer or broker-officer has liability because of general supervisory responsibilities. The Ninth Circuit does not identify any policies or procedures that the broker-officer did or could have initiated that would have the effect of cutting off personal liability of the broker-officer for the unlawful discriminatory conduct of an individual salesperson working for the corporation. In essence, the Ninth Circuit opinion requires the individual owner, officer or broker-officer to be omnipresent and if that person is not at all times present (which, as previously discussed, is impossible in the real estate business) to prevent an illegal activity then liability automatically flows to that person individually in the same manner as it does to the corporate entity.

It would be a fair construction of the Fair Housing Act to examine supervisory activities in furtherance of prevention of unlawful activities such as policies designed to prevent unlawful discrimination and perhaps even training efforts. Failure to adequately supervise as a licensed broker by dire neglect of the corporate activities or failure to act once being put on notice of a discriminatory act are manageable and acceptable duties and required as part of many licensing laws. However, the Ninth Circuit opinion makes no allowance for any of the usual supervisory activities that an owner or officer could do, on behalf of a corporation, to reduce the risk of unlawful discrimination. The Ninth Circuit opinion makes no allowance for whether the corporation had training or supervision in place. No allowance for whether there was fair housing educational requirements that needed to be met, either as a condition of employment or holding a real estate license. No allowance for whether policy statements, in writing or otherwise, are established by the corporate entity. In short, there is no allowance for the type of things, theoretically, that an owner or officer can insist upon in a real estate broker corporation. The Ninth Circuit opinion leads one to conclude that all that has to happen for vicarious liability to attach to an individual owner or officer, in addition to the corporation, is for the broker-officer to have the right to control conduct. In such a world, personal liability would attach any time an errant or disenfranchised salesperson says the wrong thing, no matter what efforts the owner, officers or broker-officer took to prevent such an unfortunate event from occurring. Since a broker's physical presence in every step of a potential transaction is an

impossibility, absolute prevention cannot occur. Reasonable steps at prevention can occur. Yet under the Ninth Circuit's ruling, the corporate broker-officer is personally at risk for an activity not within his control and presumably is at risk even if he *had* done everything in his control.

The broker-officer is treated as the corporation itself. Having a corporation take these risks because it is in the business of real estate brokerage is one thing, extending the corporate liability doctrine to innocent owners, officers or broker-officers is another altogether. No other Circuits have gone so far in interpreting the fair housing laws, nor should the Ninth Circuit be allowed to do so.

VI.

CONCLUSION

CAR believes that the Ninth Circuit's holding that innocent owners and officers of real estate corporations may be held personally liable for an employee's violation of the Fair Housing Act is inconsistent with well established bodies of law and establishes poor public policy. Accepted foundations of corporate law and structure have been summarily displaced as they apply to real estate licensees. The policy behind those corporate principles is well grounded in historic application of corporate business structures and in holding culpable people responsible in a predictable way.

Certainly CAR does not approve of nor sanction unlawful discrimination. Yet, remedies are available that reach the wrongdoer as well as the company for which

that person works. To expand it beyond these high standards of accountability and hold admittedly innocent parties liable, sweeping aside years of established corporate law would multiply injustice rather than ameliorate it.

For all of the reasons stated above, *amicus curiae*, CAR urges this Supreme Court to accept the Petition for Writ of Certiorari.

Respectfully submitted,

JUNE BABIRACKI BARLOW, ESQ.
Vice President and General Counsel
NEIL KALIN, ESQ.
Assistant General Counsel
CALIFORNIA ASSOCIATION OF REALTORS®
525 South Virgil Avenue
Los Angeles, California 90020-1403
(213) 739-8200

Counsel for Amicus Curiae,
California Association of Realtors®

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In the
Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors®,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE National Association of REALTORS® IN SUPPORT OF PETITIONER

LAURENE K. JANIK
Counsel of Record
General Counsel
RALPH W. HOLMEN
Associate General Counsel
NAN ROYTBERG
Associate Counsel
National Association of REALTORS®
430 North Michigan Avenue
Chicago, Illinois 60611-4087
(312) 329-8375

Attorneys for Amicus Curiae
National Association of REALTORS®

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

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BRIEF OF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the National Association of REALTORS® (hereinafter NAR), submits this brief in support of the petitioner, DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors®.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

NAR is a non-profit professional association that is incorporated in Illinois and represents persons engaged nationwide in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. As such, NAR is a champion of the interests of real estate professionals and real property owners throughout the United States.

Founded in 1908, NAR is headquartered in Chicago, Illinois. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR is concerned with a wide range of activities, including promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, public service, and cultural

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[1] The parties have consented to the filing of this brief. The letters of consent are filed with the Clerk of the U.S. Supreme Court herewith. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

diversity. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 State Associations of REALTORS®, approximately 1,600 Member Associations of REALTORS®, and approximately 795,000 "REALTOR®"[2] and REALTOR-ASSOCIATE® members. Petitioner David Meyer has retired from active real estate practice, but before doing so, including at the time of the events at issue in this case, was a member of NAR.

INTRODUCTION

NAR has a substantial and long-standing commitment to equal opportunity in housing and fair housing compliance. Pursuant to this commitment and immediately upon the adoption of the Fair Housing Act, 42 U.S.C. §§ 3601-3619, NAR adopted Article 10 of its Code of Ethics which mandated that:

> The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex or country of national origin. The REALTOR® shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex or country of national origin.[3]

In 1972, NAR supplemented this Article with the Code of Equal Opportunity, to which each member is also obligated to adhere. Then in 1975, NAR and the United States Department of Housing and Urban Development ("HUD")

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[2] "REALTOR®" is a federally registered collective membership mark used by members of the NATIONAL ASSOCIATION OF REALTORS® to indicate their membership status.

[3] Article 10 was amended to add the protected classes of handicap and familial status upon the enactment of the Fair Housing Amendments Act of 1988.

created and adopted a Voluntary Affirmative Marketing Agreement ("VAMA"). This VAMA was the first nationwide program to implement Section 809 of the Fair Housing Act which calls for the Secretary of HUD to "work out programs of voluntary compliance and of enforcement" with persons in the housing industry. 42 U.S.C. § 3609. The HUD/NAR VAMA served as the model for affirmative marketing agreements subsequently adopted by other segments of the real estate market, including the National Association of Homebuilders, the National Association of Real Estate License Law Officials and the American Institute of Real Estate Appraisers.[4]

The VAMA was renewed by HUD and NAR in 1981, 1987, and again in 1992. It was replaced in 1996 with the NAR/HUD Fair Housing Partnership Agreement, which remains in effect today. The Partnership Agreement lays out a comprehensive program for NAR and HUD, as partners, to implement their commitment to fair housing.

In addition to the commitments made with HUD to further fair housing, NAR also established its Office of Equal Opportunity, requires attendance at approved fair housing training as a condition of membership in the Association and urges each of its state and local associations to establish an Equal Opportunity Committee. NAR has also developed comprehensive educational programs on fair housing and cultural diversity for its membership.

NAR's interest in and concern about the opinion of the Ninth Circuit derives directly from this commitment to Fair Housing Act compliance. Fundamental to the success of NAR's continuous efforts to educate its members and encourage them to employ real estate brokerage practices that

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[4] The American Institute of Real Estate Appraisers merged in 1990 with the Society of Real Estate Appraisers to become the Appraisal Institute.

comply with the Act is that the Act's obligations be understood and applied by enforcement authorities, HUD and by the courts in a fair and reasonable fashion. Regrettably, such consistency and fairness are wholly absent from the result reached by the Ninth Circuit with respect to the Petitioner. Moreover, the unprecedented and sweeping breadth of the opinion below is of far reaching importance and concern to NAR's many members, as well as the hundreds of thousands of others involved in real estate. Unless the analysis and conclusion of the Ninth Circuit are corrected by this Court, other federal courts will struggle to resolve the conflict between existing case precedent and the unduly broad and misguided language of this opinion regarding the personal liability of owners and officers of real estate brokerage corporations for discriminatory conduct by the sales agents of such corporations. Inevitably, the result will be inconsistent results from court to court, and quite possibly a new era of liability under the Act never before conceived of and undoubtedly unintended by Congress.

SUMMARY OF ARGUMENT

The decision below merits this Court's attention because of the confusion it introduces into the law regarding the application of the Fair Housing Act to owners and officers of real estate brokerage corporations. The Ninth Circuit concluded that an individual is personally liable solely in his capacity as owner or officer of a real estate corporation when an agent of that corporation has engaged in conduct unlawful under the Act. To reach that unprecedented result, the court disregarded established principles of agency and corporate law,[5] and failed to apply the fact-

[5] Shareholder insulation from liability has been the cornerstone of corporate law in the United States since the nineteenth cen-
(continued...)

intensive analysis employed in the very decisions it relies upon. The Ninth Circuit also wholly ignored, indeed failed to even cite and distinguish, prior cases holding precisely to the contrary of its holding—that is, that corporate officers and owners of real estate firms are not, as a mere consequence of holding such positions, liable for the discriminatory practices of sales agents of the corporation. Thus, to the extent that it might be possible to reconcile those prior decisions with this opinion and those on which it relies based on the particular facts of each, the Ninth Circuit's lack of factual analysis makes such a reconciliation impossible, and a conflict between the cited decisions inescapable.

The inevitable result of the Ninth Circuit's ruling, absent this Court's correction of that result, will be inconsistent and chaotic application of the Fair Housing Act to corporate owners and officers of real estate firms. This Court should grant *certiorari* to direct the Ninth Circuit to apply appropriate standards so that this important measure of protection for equal opportunity in housing is applied consistently and fairly.

(...continued)
tury. Virtually every state has a statute that limits shareholder liability to the value of the shares held and case law that protects such shareholders from liability for the actions of the corporation. Shareholders will not, however, be insulated from liability for the tortious acts of the corporation if one of two circumstances is present. First, shareholders may be held liable if they participate in or aid in the commission of the tortious act, which is not alleged in the instant case. Second, shareholder liability can be created or imposed by statute, which the Fair Housing Act does not do.

ARGUMENT

THIS COURT SHOULD GRANT *CERTIORARI* IN ORDER TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO THE PERSONAL LIABILITY OF AN OWNER OR OFFICER OF A BROKERAGE CORPORATION FOR THE FAIR HOUSING VIOLATIONS OF THAT CORPORATION'S SALES AGENT.

NAR urges this Court to accept this case to address two specific bases relied on by the Ninth Circuit[6] to hold Petitioner Meyer personally liable for the discriminatory acts of Triad sales agent Grove Crank. First, the court held Meyer personally liable for the agent's conduct based solely on his status as owner[7] of Triad, a real estate brokerage corporation:[8]

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[6] The Ninth Circuit also asserts that its holding is supported, in part, by a HUD regulation that addresses the parties against whom an administrative complaint, rather than private litigation, may be filed, and that provides that such a complaint may be brought under the Fair Housing Act against "a person who directs or controls, or has the right to direct or control, the conduct of another person. . . ." 24 C.F.R. § 103.20 (1999). Notwithstanding the court's reference to that HUD regulation, the court's discussion and conclusions regarding Meyer's liability as owner and officer focus almost exclusively on case law which conflicts with or ignores prior case law, as discussed herein. For that reason, and because the regulation has in any event been amended to completely eliminate the language to which the court refers, see 24 C.F.R. § 103.20 (2000), one cannot conclude that the court's reference to that HUD regulation provides an independent basis for the court's decision and avoids the conflict among federal court decisions.

[7] The Ninth Circuit did not decide the issue of whether Meyer is the sole owner of Triad, and remanded to the district court to make that determination.

[8] Ownership of a majority or even all of the stock of a corporation by one person does not in itself impose any additional or different

(continued...)

> *Our rule under Phiffer renders the sole owner of a corporation liable based on the non-delegable duty to obey the FHA . . . .*

Holley v. Crank, 258 F.3d 1127, 1132 (9th Cir. 2001).[9]

Second, the Ninth Circuit also held Meyer personally liable for agent Crank's conduct based solely on Meyer's status as President of Triad:

> *[W]e join other courts in holding that officers can be individually liable for discriminatory acts of corporate employees under their management and control.*

Holley, 258 F.3d at 1134.

(...continued)
liability on the shareholder than the law imposes on stockholders generally when the stock is owned by a number of persons. *Texas Industries v. Dupuy & Dupuy Developers, Inc.*, 227 So. 2d 265 (La. App. 1969).

[9] The court also concluded that "[I]f Meyer solely owned the agency, he had at least the authority to control the acts of his salespersons, particularly in light of his position as president and officer/broker of Triad. As discussed above, this is enough, under the approach we adopt here and that adopted by a number of courts, to hold Meyer personally liable." *Holley*, 258 F.3d at 1133. That language is ambiguous as to whether the court is holding Meyer liable simply by virtue of his capacity as owner, or whether the court's conclusion is that his liability arises only if his corporate ownership is *also* coupled with the "authority to control (his) salespersons" and his "position as president and officer/broker." Since the court offers no factual support for its contention that Meyer actually had the authority to control his salespersons, and devotes separate sections of its opinion to Meyer's personal liability as sole owner, as president, and as designated officer/broker of the corporation, it appears clear that the Ninth Circuit means just what the above quoted text says: Meyer is personally liable based on his status as sole owner of the corporation, without more.

These two conclusions of the Ninth Circuit require review by this Court because they directly conflict with prior rulings by other federal courts regarding the liability, under the Fair Housing Act, of corporate owners and officers of real estate brokerage corporations. Careful analysis of the cases cited by the Ninth Circuit further reveals that there is no foundation whatsoever for its far-reaching conclusions. Moreover, to the extent that the cases cited by the court below could somehow be said to provide an adequate basis for the court's conclusions, the need for this Court's involvement is underscored, because that would mean that the conflict among Federal courts regarding this important issue—the personal liability of corporate owners and officers for the Fair Housing Act violations of sales agents of the firm—is even more pervasive. Put differently, a conclusion that the Ninth Circuit's decision here is, in fact, the correct result in light of the cases on which it relies would mean that all those decisions, and not simply the opinion below, are in conflict with the decisions that hold that corporate owners and officers are not, without more, liable for Fair Housing Act violations of sales agents of their corporations. In either case, however, it is quite clear that this Court's review of the decision below is necessary to reconcile these conflicting decisions and to remove the significant lack of clarity and substantial uncertainty regarding this issue, which is of great consequence to hundreds of thousands of real estate brokerage corporation owners and officers.

A. The Ninth Circuit's Decision Conflicts With Prior Well-Reasoned Decisions Regarding the Liability of Corporate Owners and Officers of Real Estate Firms Under the Fair Housing Act.

The Ninth Circuit's conclusion that Meyer, as owner and officer of Triad and without more, is personally liable for the fair housing violations of sales agent Grove Crank,

conflicts with prior decisions of courts that have started with the basic tenet of corporation law that "no individual may be held vicariously liable for a company pattern or practice simply because she is an officer or manager of the company." *U.S. v. Lorantffy Care Center*, 999 F.Supp. 1045 (N.D. Ohio 1998). Recognizing that the compelling need to enforce the Fair Housing Act must be reconciled with the respect courts and legislatures must afford innocent corporate owners and officers, a number of courts have rejected holding corporate owners and officers liable under the Fair Housing Act by virtue of their status alone. *Reed v. Michael Realty & Associates, Inc.*, 1994 WL 559225 9, 10 (N.D. Ill. October 7, 1994); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F. Supp. 1232 (N.D. Ohio 1983), *aff'd in part, rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985), *cert. denied by Hilltop Realty, Inc. v. City of Cleveland Heights*, 475 U.S. 1019 (1986), *accord, Lorantffy*, 999 F.Supp. at 1045; *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141 (4th Cir. 1975). These courts have opted instead for a careful and thorough analysis of the facts regarding the relationship of the corporate owners or officers to the allegedly discriminatory conduct or to their involvement in the actual management of the corporation.

For example, in *Heights Community Congress v. Hilltop Realty, Inc*, the U.S. District Court, District of Northern Ohio, declined to hold Vincent Aveni, the president, chief operating officer and co-owner of Hilltop Realty, Inc., vicariously liable for the fair housing violations of Hilltop agents, absent a showing "that he participated in their acts or knew of and ratified their acts and statements." 629 F. Supp. at 1304. Here, the court reasoned, the agents had a contractual relationship with the corporation, not with Aveni, so it was the corporation that was liable for the imputed actions of the agents. *Id.* at 1303. The court further declared that Aveni's "partial stock ownership would

not permit a *per se* piercing of the corporate veil" and that Aveni's "status as president and chief operating officer in and of itself does not render him personally liable for acts of the corporation or its agents or employees." *Id.* at 1303-04. The court carefully examined other aspects of Aveni's conduct, and the fact that Hilltop and Aveni had not required sales agents to record the race of prospects. *Id.* The court concluded that while such recording is recommended to track and prove compliance, it is not required under the Fair Housing Act. *Id.* In short, the court refused to hold Aveni personally liable for the wrongful conduct of Hilltop's agents simply because he was an officer and co-owner of Hilltop. *Id.* The court further exonerated him after a thorough review of the facts showed that he had not participated in, knew of or ratified the discriminatory conduct. *Id.* at 1305. This result is precisely the opposite of the conclusion reached by the Ninth Circuit.

In *Reed v. Michael Realty & Associates, Inc.*, the U.S. District Court, District of Northern Illinois, found that the President and Secretary of the real estate brokerage corporation, George S. Michael, was not personally liable for the discriminatory acts of the corporation's apparent agent, Butch Daniels, by virtue of being a corporate officer and nothing more. 1994 WL 559225 at 10. Without expressly stating that Michael's status as Secretary and President was insufficient to hold him liable for the acts of the corporation's agent, the court denied plaintiff's motion for summary judgment on that issue because plaintiff had failed to offer undisputed evidence that Michael actively supervised Daniels, knew that Daniels was involved in rental activities, or "that the agency relationship between Michael and Daniels was . . . close or direct." *Id.* at 9. In short, the court held that Michael could not be personally liable based strictly on the fact that he was an officer of the real estate brokerage corporation. *Id.* This result, too, is precisely the opposite of the conclusion the Ninth Circuit reached.

In *U.S. v. Lorantffy Care Center*, the court found that four individual defendants "associated with" a nursing home owned by a not-for-profit corporation (relationship not specified) were entitled to judgment as a matter of law. 999 F.Supp. at 1040-41. The law, the court said, provides that "no individual may be held vicariously liable for a company pattern or practice simply because she is an officer or manager of the company." *Id.* at 1044. The court focused its attention on Defendant Tibor Domotor, a minister who had founded the nursing home, with the aid of his church (a separate legal entity), for older Hungarian immigrants in need. *Id.* at 1040-41. The government alleged that the not-for-profit corporation that owned the facility had engaged in a pattern and practice of racial discrimination against African Americans, and that "Reverend Domotor and other LCC staff" had made discriminatory statements that resulted in this pattern and practice. *Id.* at 1041. The court held, however, that the individual defendants could not be held liable for the discriminatory pattern and practice, and that only the "company is liable for the acts and statements of its employees." *Id.* at 1045. The court noted that the other courts in its circuit that had addressed similar violations of the Fair Housing Act, with respect to the individuals who have ownership or management responsibilities for their corporation, have applied the "doctrine of vicarious liability to the company, not the company's individual officers." *Id., citing Hilltop*, 629 F.Supp. at 1303; *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974). Applying that reasoning to the context of the case before it, where a not-for-profit (nonstock) corporation owned the facility, the court declined to find the individual defendants personally liable simply because they were "associated with" the corporation. *Id.* at 1045. Again, this result conflicts with the conclusion of the Ninth Circuit.

Although it addresses the analogous issue of the liability of corporate directors for Fair Housing Act violations by corporate agents, *Tillman v. Wheaton-Haven Recreation*

Ass'n, Inc. is also instructive. 517 F.2d at 1141. In *Tillman*, the Fourth Circuit held that §§1981 and 1982 of the Civil Rights Acts of 1866 and 1964 "should be interpreted as neither enlarging nor diminishing the liability of directors under general corporation law for tortious acts performed nominally by the corporation." *Id.* at 1144. The Fourth Circuit was unwilling to find the directors of Wheaton-Haven Recreation Association personally liable for discrimination by the Association by virtue of their positions as directors alone. *Id.* Instead, the court engaged in a thorough examination of the directors' actions and intentions and reasoned that "directors become personally liable when they intentionally cause a corporation to infringe the rights secured by §§ 1981 and 1982." *Id.* at 1146. In short, the court was unwilling to hold corporate directors, who by definition are more directly responsible for corporate management than shareholders, personally liable for the discriminatory acts of the corporation or the corporation's agents by virtue of their positions alone.

Each of these cases conflicts with the result and simplistic analysis of the Ninth Circuit. Contained in each of these cases—but wholly absent from the Ninth Circuit's decision—is each court's careful scrutiny as to whether there was a sufficient level of involvement on the part of the defendant to warrant holding an individual personally liable for the fair housing violations of the agent of the corporation, organization or company. The benefits of these thorough analyses are threefold. First, the court satisfies the compelling need to provide relief for the victim of the discriminatory conduct, because in each case there is relief from the corporation. Second, the court does not cursorily punish an innocent owner or officer of the corporation personally based solely on his serving in these capacities. Third, the court embraces, rather than abandons, established and desired principles of agency and corporation law. This Court's involvement is essential to resolve the conflict

between the carefully drawn conclusions of the courts described above and the perfunctory analysis and incorrect conclusion of the Ninth Circuit in the instant case, and to prevent future conflicts and confusion by those many real estate corporation owners and officers regarding how to conform their conduct to the Fair Housing Act.

B. The Ninth Circuit's Decision Holding That an Owner or Officer of a Corporation Is Personally Liable for the Discriminatory Conduct of the Corporation's Sales Agent Is Not Supported By, and Exceeds the Principles Stated in, the Cases on which the Ninth Circuit Relies.

Despite the Ninth Circuit's citation of authority to reach the conclusion that Meyer, in his capacity as owner and officer of Triad and without more, is personally liable for the discriminatory conduct of sales agent Grove Crank, that decision is, in fact, unique and without precedent. The court cites and relies most prominently and emphatically on *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980), *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (7th Cir. 1992), *cert. denied by Ernst v. Leadership Council for Metropolitan Open Communities*, 508 U.S. 972 (1993), *Walker v. Crigler*, 976 F.2d 900 (4th Cir. 1992), and *Marr*, 503 F.2d at 735. Close examination of the holdings in those cases, and the facts out of which they arise, reveals the court's cursory, superficial and ultimately flawed analysis.

Phiffer involved the plaintiff's claim that he suffered unlawful discrimination in being denied the opportunity to rent office space by the "desk clerk" of the Proud Parrot.[10] 648 F.2d at 548. In addition to suing the Proud Parrot

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[10] In *Phiffer*, the plaintiffs' complaint was based on an alleged violation of 42 U.S.C. §1982, rather than the Fair Housing Act.

Motor Hotel, Inc., the plaintiff also sued Robert Chow, whom the opinion describes as "the owner of the Proud Parrot," *Id.* at 550. The opinion, however, is silent regarding the important distinction of whether Chow was owner of the motor hotel facility or owner of the corporate defendant Proud Parrot Motor Hotel, Inc. In holding Chow personally liable for the desk clerk's conduct, the Ninth Circuit, in *Phiffer*, noted that "[D]iscriminatory conduct on the part of a rental agent is . . . attributable to *the owner of a motel, apartment complex, or other public housing facility*" and that "[t]he duty of the owner *of such a facility* to obey the laws relating to racial discrimination is non-delegable." *Id.* at 552 (emphasis added). The court fails to indicate whether Chow's liability is based on his ownership of the motor hotel *facility* personally, or whether it derives from his sole ownership of Proud Parrot Motor Hotel, Inc., a failure that undermines the Ninth Circuit's reliance on *Phiffer* as support for its holding regarding Meyer's liability as corporate owner.

The Ninth Circuit's reliance on *Phiffer* is also compromised because of its failure to recognize another fact that appears to underlie the court's decision to hold Chow liable. While the Ninth Circuit in *Holley* claims that *Phiffer* "concluded that the owner of the Proud Parrot Motor Hotel Corporation was liable for the discriminatory conduct of his desk clerk *even absent any evidence that the clerk acted under management's instruction*," *Holley*, 258 F.3d at 1132, (emphasis added), the court dismissively relegates to a footnote the important contradictory fact that the *Phiffer* court specifically acknowledged, namely that "the magistrate found that the desk clerk's actions reflected the established policy of the Proud Parrot." 258 F.3d at 1132, n.3, *citing Phiffer*, 648 F.2d at 552.

For two reasons, then, *Phiffer* provides little or no support for the holding that Meyer is liable here. First, Chow may or may not have been an owner of the corporation, the

capacity in which Meyer is said to be liable here. Second, the court recognized that the desk clerk's actions were consistent with the policies of hotel management, presumably established by Chow, a fact not even alleged in *Holley*.

In *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, the Seventh Circuit held that the owner of the defendant corporation was personally liable for the Fair Housing Act violations of certain sales agents of the firm. 982 F.2d at 1086. In holding Matchmaker owner Erwin Ernst liable, the court noted that Ernst was sole owner, chief executive officer and that "[S]ignificantly, he supervises the day-to-day operations of Matchmaker and its agents." *Id.* at 1098. Based on those facts, and not simply on Ernst's status as owner of Matchmaker Real Estate Sales Center, Inc., the court held Ernst personally liable. *Id.* Thus, although the Ninth Circuit cites *Matchmaker* and claims to "adopt (its) reasoning," and "follow (its) lead," *id.* at 1133, in fact, the Ninth Circuit's conclusion conflicts with the decision in *Matchmaker*. The Ninth Circuit held Meyer liable, and will be read and understood by subsequent courts to have held him liable, merely on his status as owner and officer of Triad, while the Seventh Circuit in *Matchmaker* applied a more rigorous test that premised Erwin Ernst's liability on his status *also* as "chief executive officer and supervisor of day-to-day operations." *Id.*

The facts in *Walker v. Crigler* indicate why it is distinguishable and inapplicable here. 976 F.2d at 900. In *Walker*, the owner of rental property was held liable for discriminatory conduct by the property manager, whose duties included renting the property and who had been hired by the owner. *Id.* at 904-05. The court held that the property owner could not delegate to another his clear and primary duty under the Fair Housing Act not to discriminate in renting the property, and therefore it was irrelevant that the owner had not instructed the manager to engage in such conduct. *Id.* at 904. NAR acknowledges that the

"non-delegation" principle is properly applied in this context to hold a property owner, such as that in *Walker*, liable for the acts of the owners' agents. But the decision in *Walker* and the principle by which the owner in that case was held liable is wholly inapplicable to the quite different question of concern to NAR and presented in this case: whether an owner or officer of a real estate corporation is, by virtue of that status alone, obligated under the Fair Housing Act such that a violation of the Act by agents *of the corporation* can be imputed to him based on the non-delegability of those obligations. Traditional principles of *respondeat superior* and non-delegability operate to preclude a corporation from escaping liability for the actions of the corporation's agents, but whether such liability also extends beyond the corporation, to reach the corporation's shareholders and officers, is a distinct question that is not answered by these principles.

In *Marr v. Rife*, the Sixth Circuit reversed the District Court's conclusion that, as a matter of state law, the owner of a real estate firm could not be held liable for the discriminatory conduct of the firm's agents.[11] 503 F.2d at 735. In reversing that result and holding the proprietor of the real estate agency liable under the Fair Housing Act, the court relied extensively on facts demonstrating that there was actual supervisory control exercised by the proprietor over the agents of the real estate agency before concluding that "as owner of the agency, Rife had at least the power to control the acts of his salesmen." *Id.* at 742. It is also notable that the court in *Marr* reached its conclusion based on its extensive discussion of and reliance on *U.S. v. Northside Realty Associates, Inc.*, a case also cited by the court below in support of its conclusion regarding Meyer's liability as owner and officer of Triad. 474 F.2d 1164 (5th Cir. 1973). In *Northside*, the owner of Northside Realty Associates, Inc. was held liable for discrimination in housing by the corporation's agents. 605 F.2d at 1354. That conclusion by the Fifth Circuit, however, is clearly premised on the owner's significant personal involvement in discriminatory conduct, as well as his capacity as a broker for the firm, with substantial involvement in and direct oversight and supervision of the agents found to have violated the Act. *Id.* In short, neither *Marr* nor *Northside* support the Ninth Circuit's holding that merely as owner or officer of Triad, Meyer may be liable for the Fair Housing Act violations of Triad's sales agent Grove Crank.

[11] In the opinion, the firm is described only as "a real estate agency," and thus not necessarily a corporation. Indeed, the opinion refers to defendant Doug Rife as "proprietor of the agency," at least suggesting that the firm was a sole proprietorship, rather than a corporation. On that basis alone, the relevance of this case to the question of whether an owner or officer of a *corporation* is seriously compromised, if not entirely eviscerated, since the identity between a proprietorship and its proprietor make the agents of the firm agents of the individual proprietor as well.

The court also cites *U.S. v. Youritan Const. Co.*, 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd in part, remanded in part by* 509 F.2d 623 (9th Cir. 1975). But that case holds nothing more than that the doctrines of *respondeat superior* and non-delegabilty apply to hold liable a principal, in this case the owner and the property manager of a residential rental apartment building, for the conduct of the principal's agents, in this case the apartment manager and rental agents. *Id.* As noted above, NAR acknowledges and does not dispute that conclusion. But it does not apply to, and provides no persuasive authority regarding, the question of the liability of the owners and officers of the principal when that principal is a corporation.

The only case cited by the court that is even arguably supportive of its holding is *U.S. v. Tropic Seas, Inc.*, 887 F.Supp. 1347 (D. Haw. 1995). Its relevance to the issues in the case below, however, is limited. In *Tropic Seas*, the

District Court denied the summary judgment motion of two directors of a corporation who were alleged to have committed violations of the Fair Housing Act, citing the nondelegability principle. *Id.* at 1365. In support of that ruling, however, the court referenced allegations suggesting that the defendant directors had affirmatively supported policies of the corporation that were central to the discriminatory conduct at issue. *Id.* at 1364-65. Moreover, the defendants were corporate directors, who are more directly involved in and responsible for corporate management than are shareholders. *Id.* For that reason, therefore, the Ninth Circuit's reliance on *Tropic Seas* as authority for the unprecedented and novel proposition that corporate owners, in that capacity alone, can be liable for the Fair Housing Act violations of corporate agents, or violations attributable to the corporation by virtue of the acts of its agents, is unwarranted.

In sum, the authority relied on by the Ninth Circuit neither supports its conclusions that an owner or officer of a real estate brokerage corporation, in those capacities alone, can be held personally liable for the Fair Housing Act violations of corporate agents, nor is it a reasonable and natural extension of those decisions. The Ninth Circuit confuses or misapplies the well-accepted doctrines, embraced by these cases, that a corporation may be liable under *respondeat superior* and the nondelegability of the duty to comply with the Fair Housing Act, with the far different issue of the liability of the corporation's owner(s) and officers. This important question of federal fair housing law affects literally hundreds of thousands of individual real estate brokerage corporation owners and officers. This Court's review is necessary to resolve the conflict between the Ninth Circuit decision in *Holley* and the cases on which it relies, and the decisions in Section A, *supra*, that hold quite directly and clearly that corporate owners and officers are *not* personally liable, absent additional facts related to

their participation in the real estate activities of the firm or the discriminatory conduct of the firm's agents.

CONCLUSION

For the foregoing reasons, NAR respectfully urges this Court to grant the Petition for certiorari.

DATED: April 8, 2002

Respectfully submitted,

LAURENE K. JANIK
Counsel of Record
General Counsel
RALPH W. HOLMEN
Associate General Counsel
NAN ROYTBERG
Associate Counsel
National Association of REALTORS®
430 North Michigan Avenue
Chicago, Illinois 60611-4087
(312) 329-8375

Attorneys for Amicus Curiae
National Association of REALTORS®

No. 01-1120

(15)

In The

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE PETITIONER

BROWN & PEEL
JAMES W. PEEL
3585 West Beechwood
Suite 101
Fresno, California 93711
(559) 431-1300

BENEDON & SERLIN
DOUGLAS G. BENEDON*
GERALD M. SERLIN
21700 Oxnard Street,
Suite 1290
Woodland Hills, California
91367
(818) 340-1950
**Counsel of Record*

Attorneys for Petitioner
David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Under well-established rules of agency and corporate law, a corporate owner or officer will not be held vicariously liable for the torts of his corporation or its other agents merely by virtue of his office. Rather, liability must be founded upon the owner's or officer's own specific acts.

The question presented here is whether, as held by the Ninth Circuit, the criteria for liability under the Fair Housing Act (42 U.S.C. § 3601, *et seq.*, "FHA") are different, so that owners and officers of corporations are absolutely liable for an employee's or agent's violation of the Act, whether or not they personally directed, authorized, or were even aware of the particular violations that occurred.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this proceeding are petitioner David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba, Triad Realtors, and respondents Emma Mary Ellen Holley, David Holley, Michael Holley, a minor, and Brooks Bauer, individually and on behalf of the general public.

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OPINIONS BELOW

The district court's orders granting in part petitioner's motion to dismiss and granting petitioner's motion for summary judgment are not published. These unpublished orders are reprinted in the Joint Appendix ("J.A.") at pages 25-35 and 48-55. The court of appeals' opinion is published at 258 F.3d 1127 (9th Cir. 2001), and is reprinted in the Joint Appendix at pages 57-71. The court of appeals' orders denying rehearing and rehearing en banc and staying mandate are set forth in the Joint Appendix. J.A. 72-74.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on July 31, 2001. A petition for rehearing and rehearing en banc was timely filed, and denied on September 19, 2001. Justice O'Connor subsequently extended the time to file a petition for writ of certiorari to and including February 1, 2002. The petition was filed on January 28, 2002, and granted on May 20, 2002.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

1. The Fair Housing Act of 1968 (FHA), 42 U.S.C. § 3601, *et seq*. The relevant provisions of this statute – §§ 3610, 3612, and 3613 – are reprinted in the Petition Appendix ("Pet. App.") 41-61.

2. Former 24 C.F.R. §§ 103.10-20 (1999). Pet. App. 62-63.

3. Current 24 C.F.R. §§ 103.10-20 (2000). Pet. App. 63-64.

STATEMENT OF THE CASE

A. The Factual Allegations Of The Complaint.[1]

Respondent Emma Mary Ellen Holley is African-American, her husband Respondent David Holley, is Caucasian, and their son, Respondent Michael Holley is African-American. J.A. 3-4. Respondent Brooks Bauer, an individual, is a general contractor residing in Twenty-Nine Palms, California.[2] J.A. 3. Petitioner David Meyer ("Meyer"), an individual, is the alleged owner, president and designated officer/broker of Triad, Inc., dba Triad Realty ("Triad"), a California real estate corporation doing business in Twenty-Nine Palms, California. J.A. 4.

According to the allegations of the complaint, in October 1996, the Holleys visited Triad's office where they met with Triad agent Grove Crank and inquired about listings for new houses in the range of $100,000 to

[1] This appeal arose following the granting in part of Petitioner David Meyer's motion to dismiss. J.A. 25-35. For the purpose of reviewing a motion to dismiss, the properly pled factual allegations of a plaintiff's complaint are presumed to be true. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

[2] The Holleys and Mr. Bauer are referred to collectively as "Plaintiffs."

$150,000. The Holleys alleged that Crank showed them four houses in the area, all priced above $150,000. J.A. 8.

In mid-November 1996, the Holleys located a home on their own that happened to be listed by Triad. In response to the Holleys' inquiry about the home, Triad agent Terry Stump informed them that the asking price for the house was $145,000. The Holleys expressed interest in purchasing the home, offered to pay the asking price, and to put $5,000 in escrow for the builder to hold the house until April or May 1997 when they were to close escrow on the sale of their current home. J.A. 9.

Stump allegedly told the Holleys that their offer seemed fair, as did the builder, Respondent Brooks Bauer, when Mrs. Holley called him with the same offer. Bauer, however advised the Holleys that their offer would have to go through Triad. Later, Stump allegedly called Mrs. Holley to tell her that more experienced agents in Triad's office, one of whom was later identified as Crank, felt that $5,000 was insufficient to get the builder to hold the house for six months. The Holleys decided not to raise their offer and Triad never presented the original offer to Bauer. J.A. 9-11.

One week later, Bauer inquired at Triad about the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys, telling Bauer that he did not want to deal with those "niggers," and called them a "salt and pepper team." The Holleys eventually hired a builder to construct a house for them and Bauer later sold his house for approximately $20,000 less than the Holleys had offered. J.A. 13-14.

B. The Proceedings Below.

1. Plaintiffs' Complaints.

Plaintiffs filed a complaint on November 14, 1997, alleging that Crank and Triad violated federal and state fair housing laws, including the FHA ("the Triad action"). See J.A. 59. They later filed a separate action against Meyer as the officer/broker, president, and owner of Triad, covering the same factual allegations ("the Meyer action"). J.A. 2-24. The District Court consolidated the Triad and Meyer actions. C.R. 10.

Plaintiffs' amended complaint does not allege Meyer participated in, ratified, or even knew of the alleged discriminatory acts of Triad or its agents. Rather, with respect to Meyer, Plaintiffs alleged that he owned Triad and served as its president and designated officer/broker. J.A. 4, 7-8. Plaintiffs alleged that Triad operates under Meyer's broker's license, and that Meyer is the only officer or employee of Triad who holds a broker's license. According to Plaintiffs' allegations, because Meyer is the president and broker of Triad, its agents and employees "ultimately" reported to him. Finally, Plaintiffs alleged that each Triad agent is employed by Triad under Meyer's supervision or direction in his capacity as its broker and president. J.A. 7-8.

2. The District Court Decisions.

Meyer moved to dismiss Plaintiffs' action on the ground it failed to state a claim. See Fed. R. Civ. P. 12(b)(6). The district court granted the motion on all of Plaintiffs' claims, except their FHA claim, on the ground they were barred by the applicable statutes of limitation. J.A. 25-35. Plaintiffs did not appeal this ruling.

With respect to Plaintiffs' FHA claim, the district court granted the motion to dismiss Meyer in his capacity as an officer of Triad, stating that "any liability against Meyer as an officer of Triad would only attach to Triad in that Plaintiffs have not urged theories that would justify reaching Meyer individually." J.A. 31. The district court, however, denied the motion to dismiss Meyer in his capacity as the designated officer/broker of Triad, finding that, under applicable law, "if plaintiffs establish that a discriminatory act took place by an agent who operated under a broker's license held by Meyer as an individual and not as an officer, they could recover against Meyer individually." J.A. 32.

Meyer moved for summary judgment on Plaintiffs' remaining claim. See Fed. R. Civ. P. 56(c). In support of his motion, Meyer submitted evidence that he had not held a broker's license as an individual since the early 1980's, i.e., well before the incidents alleged in Plaintiffs' complaint. Joint Appendix Lodging ("J.A.L.") 3. From August 1994 through August 1998, Triad was a corporate licensee, with Meyer designated as Triad's officer/broker. Meyer's broker's license was thus valid only as an officer of Triad. J.A.L. 3-4, 8.

From April 1994 through April 1998, Triad was Crank's exclusive employing broker. J.A. 40; J.A.L. 10-11. Indeed, during the relevant period each of the agents in the office were acting under Triad's corporate license, and not under a license held by Meyer as an individual. J.A. 40.

Plaintiffs did not address or present evidence on the relevant issue on summary judgment as framed by the district court, i.e., the status of Meyer's license. Instead,

Plaintiffs argued that the court had misread the law regarding personal liability of principals for the unlawful acts of their agents under the FHA.[3] J.A. 53-54. Plaintiffs submitted selected excerpts of Meyer's deposition in which he stated he "understood" his responsibilities as the designated officer/broker at Triad to include making sure that Triad's agents "were acting lawfully, that contracts were negotiated lawfully, ... [and] that people were treated lawfully." J.A.L. 134-35.

Plaintiffs' evidence, however, also established that while Meyer had been the sole stockholder of Triad, he transferred all of his ownership interest to Crank in February 1995. From that point on, Crank became the office manager and took over the day-to-day running of the business. J.A.L. 121-36. Though Meyer would meet with Crank about once a month to discuss corporation business, Meyer no longer had responsibility for monitoring Triad's daily activities.[4] J.A.L. 137.

The district court granted Meyer's motion for summary judgment. The court found that during the time relevant to this case, Triad, not Meyer, was the licensed broker. Accordingly, Crank's contractual relationship was

[3] The district court correctly found that Plaintiffs' opposition was framed as an improper motion for reconsideration of the court's prior order granting in part and denying in part Meyer's motion to dismiss. J.A. 53-54; see *Hopkins v. Andaya*, 958 F.2d 881, 887 n. 5 (9th Cir. 1992).

[4] The court of appeals found there to be a question of fact and credibility, and remanded to the district court to determine whether Meyer owned Triad at the time at issue. J.A. 65. Accordingly, Meyer will explain why, assuming he was the owner of Triad, he still has no liability, and therefore remand is unnecessary.

with Triad. Thus, Crank's alleged discriminatory acts were imputed to Triad, not to Meyer as an individual. "Hence, Meyer cannot be held personally responsible for Crank's alleged misconduct." J.A. 54-55; see *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 629 F. Supp. 1232, 1303 (N.D. Ohio 1983), *rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985).

The district court entered judgment for Meyer. J.A. 56.

3. The Court Of Appeals' Decision.

The Court of Appeals for the Ninth Circuit reversed in a published decision. The court acknowledged that "under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action." J.A. 58. The court further acknowledged that "the evidence does not indicate that Crank acted with the approval or at the direction of Meyer." J.A. 66. However, the court held "the criteria for the Fair Housing Act [are] different as liability is specified for those who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling." J.A. 58. Additionally, the court of appeals found Meyer could be personally liable based on its interpretation of the FHA as imposing a "nondelegable" duty not to discriminate. J.A. 63. Finally, the court of appeals held its "harsh" result was justified by the policy of the FHA. J.A. 62-63.

On these bases, the court therefore concluded Meyer could be personally liable for Crank's conduct based solely on Meyer's status as the owner and officer of Triad. J.A. 71.

SUMMARY OF ARGUMENT

Under well-settled principles of common law, corporate owners and officers are not vicariously liable for the torts of the corporation or its other agents. Rather, liability must be founded upon the owner's or officer's own specific acts. The court of appeals acknowledged this law, as well as the absence of any evidence in this case that Crank, Triad's sales agent, acted with Meyer's knowledge or approval. The court of appeals instead read the FHA as imposing vicarious liability, based solely on a corporate owner's or officer's right of control, and on an interpretation of the FHA as imposing a "nondelegable" duty not to discriminate. The court of appeals' conclusions are based on an erroneous reading of the FHA, the HUD regulations, and the case law, and conflict both with authority from this Court and other lower courts.

First, the language of the FHA gives no indication Congress intended to abrogate or enlarge the common law governing the corporate form and liability. By reading the FHA to impose vicarious liability on corporate owners and officers, the court of appeals thus enlarged the statute so that what was omitted – an explicit provision altering the liability of corporate owners and officers under the common law – would be included within its scope. This far exceeded the proper judicial function. As the Court has held, the failure of a statute to speak to a matter as fundamental as the liability implications of corporate ownership "demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Bestfoods*, 524 U.S. 51, 63, 118 S.Ct.

1876, 1885 (1998). This "congressional silence" in the FHA concerning deviations from common law rules of liability is "dispositive." *Id.*, at 70.

Nor can the court of appeals' expansionist reading of the FHA be supported by the HUD regulations on which it relied. This is so for several reasons. The court of appeals relied on a pre-amended version of 24 C.F.R. § 103.20 (1999), which provided that an administrative complaint could be filed against any person who "has the right to direct or control the conduct of another person" if that other person "acting within the scope of his of her authority as employee or agent of the directing or controlling person" has engaged in a discriminatory housing practice. The court of appeals' elevation of this administrative regulation – which no longer existed at the time the court of appeals relied upon it – to the level of controlling law was error.

Second, the court of appeals' expansionist reading of the FHA cannot be supported on the alternate basis relied on by the court, i.e., that the duty not to discriminate under the FHA is "nondelegable." The court of appeals' insertion of a nondelegable duty into the text of the FHA conflicts with authority of this Court, holding that civil rights statutes do not impose a nondelegable duty. See *Gen. Bldg. Contractors Ass'n v. Pennsylvania,* 458 U.S. 375, 396, 102 S.Ct. 3141, 3153 (1982) (interpreting 42 U.S.C. § 1981). The text of the FHA itself imposes no such duty, and, like a theory of vicarious liability based on a right of control, should not be read into the statute by the courts. *United States v. Bestfoods*, *supra*, 524 U.S. at 63, 118 S.Ct. at 1885.

Third, to impose liability on Meyer as an officer/broker of Triad under the FHA, the court of appeals relied on California's statutory scheme for the licensing and discipline of designated officer/brokers. That state statutory scheme, which extends a disciplinary scheme rather than creating a private right of action, cannot be used to create liability under the FHA.

Fourth, the court of appeals believed its expansion of liability was warranted by the policy underlying the FHA to provide a remedy to those who are the victims of discrimination in housing. No such expansion of the law is necessary to serve that purpose. Under established law, victims of housing discrimination have a remedy against both the agent who allegedly violated the FHA, as well as the agent's principal, the corporation. No further purpose is served by allowing plaintiffs to proceed personally against an innocent owner or officer of the corporation, who neither participated in, nor authorized or ratified, the agent's conduct. Such a quest for an imagined "deep pocket" is repugnant, and in no way furthers the actual laudable policy underlying the FHA.

Indeed, public policy demands that liability of corporate owners and officers not be expanded. By holding corporate owners and officers liable for the conduct of the corporation's agents, whether or not they directed, authorized, or even knew of the particular discriminatory act, the court of appeals' decision has, without exaggeration, opened the floodgates of litigation throughout the country, and rendered the very purpose of the corporate structure nugatory. Such a holding is not in the interests, and should not be the law, of this nation.

ARGUMENT

I. THE FHA SHOULD NOT BE READ TO IMPOSE VICARIOUS LIABILITY ON CORPORATE OWNERS AND OFFICERS BASED SOLELY ON THEIR RIGHT OF CONTROL.

A. Common Law Rules Governing Corporate Form And Liability Control Absent A Specific Contrary Indication From Congress.

The court of appeals recognized that under general principles of tort law, corporate shareholders and officers are not held vicariously liable for the actions of the corporation or its other agents. It held, however, that the criteria under the FHA are different, "as liability is specified for those who direct or control or have the right to direct or control the conduct of another" with respect to the sale of a dwelling. J.A. 58.

In reaching its conclusion that the criteria for liability under the FHA are different than under general principles of tort law, the court of appeals did not rely on the text of the FHA, which neither "specifies" nor purports to expand the class of persons who can be sued for alleged discriminatory housing practices. Rather, the court assumed that Congress silently swept away that aspect of existing common law relating to the limited liability of corporate owners and officers, inserting in its place vicarious liability based solely on the owner's or officer's right of control. What the court did, therefore, was "not a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted" – an explicit provision altering the liability of corporate owners and officers – "may be included within its scope." *W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 101, 111 S.Ct. 1138, 1148 (1991)

(quoting *Iselin v. United States,* 270 U.S. 245, 250-51, 46 S.Ct. 248, 250 (1926) (Brandeis, J.). However, "[t]o supply omissions transcends the judicial function." *Ibid.*

This is especially true when the omission relates to the well-established body of state corporate law. As the Court held in *Burks v. Lasker,* 441 U.S. 471, 477-78, 99 S.Ct. 1831, 1836-37 (1979):

> It is true that in certain areas we have held that federal statutes authorize the federal courts to fashion a complete body of federal law. [Citation.] Corporation law, however, is not such an area. . . . [I]n this field congressional legislation is generally enacted against the background of existing state law; Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute. See also *United States v. Bestfoods, supra,* 524 U.S. at 63, 118 S.Ct. at 1885.

This omission of the FHA to speak to a matter as fundamental as the vicarious liability of corporate owners and officers demands application of the rule that "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas,* 507 U.S. 529, 534, 113 S.Ct. 1631, 1634 (1993) (internal quotation marks omitted); see *United States v. Bestfoods, supra,* 524 U.S. at 62-63, 118 S.Ct. at 1885-86 (CERCLA cannot be read to abrogate state corporation law unless it speaks directly to the issue, which it does not); see also *Imbler v. Pachtman,* 424 U.S. 409, 417-18, 96 S.Ct. 984 (1976) (federal civil rights statute did not abrogate general tort immunities; instead it must be interpreted in light of the immunities).

Congressional silence is "dispositive." *United States v. Bestfoods, supra,* 524 U.S. at 70, 118 S.Ct. at 1889.

Congress has not been oblique when it has imposed some version of a "control" test as a replacement for the traditional standards governing vicarious liability. For example, the Securities Exchange Act of 1934 expresses the issue in these terms:

> Every person who, directly or indirectly, controls any person liable under the provisions of this chapter . . . shall also be liable jointly and severally with and to the same extent as such controlled person. 15 U.S.C. § 78(t)(a).

Similarly, in the context of antitrust law, Congress has directly specified the personal liability of corporate owners and officers for acts of the corporation. 15 U.S.C. § 24 provides in relevant part:

> Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation. . . .

Clearly, "[w]hen Congress wished to create such [secondary] liability, it had little trouble doing so." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 184, 114 S.Ct. 1439, 1452 (1994). Congress has demonstrated no such expansionist intent in the FHA. It should not be read into the statute by the courts. *W. Va. Univ. Hosp., Inc. v. Casey, supra,* 499 U.S. at 101, 111 S.Ct. at 1148; *United States v. Bestfoods, supra,* 524 U.S. at 70, 118 S.Ct. at 1889 ("[C]ongressional silence

concerning deviations from the common law is "dispositive").

B. Under The Common Law, Corporate Owners And Officers Are Not Vicariously Liable For The Torts Of The Corporation Or Its Other Agents.

1. Corporate Officers Are Not Vicariously Liable For The Torts Of The Corporation Or Its Other Agents.

The rule of limited liability for corporate officers has its roots in the common law of agency. "As an inanimate entity, a corporation must act through agents." *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 1991 (1985); *Braswell v. United States*, 487 U.S. 99, 110, 108 S.Ct. 2284, 2291 (1988). Officers are the agents of the corporate principal, and their liability to third persons is governed by the ordinary principles of agency. 3A Fletcher, Cyc. Corp. § 1135 (Perm. Ed.).

It follows as a fundamental tenet of corporation law that a corporate officer will not be held vicariously liable, merely by virtue of his office, for the torts of his corporation or its other agents. See 3A Fletcher, *supra*, § 1137 ("[A]n officer who takes no part in the commission of the tort is not personally liable to third persons for the torts of other agents, officers or employees of the corporation"). Rather, liability must be founded upon specific acts by the individual officer. "[M]erely being an officer or agent of a corporation does not render one personally liable for a tortious act of the corporation. Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which

operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation. [Citations.]" *Lobato v. Pay-Less Drug Stores*, 261 F.2d 406, 409 (10th Cir. 1958); see also *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1144 (4th Cir. 1975); *Escudo Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 907 (1st Cir. 1980); *Murphy Tugboat v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 852 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256, 1263 (9th Cir. 1981), *cert. den.*, 455 U.S. 1018 (1982); *Teledyne Indus., Inc. v. Eon Corp.*, 401 F. Supp. 729, 736-37 (S.D.N.Y. 1975), *aff'd*, 546 F.2d 495 (2nd Cir. 1975); *Frances T. v. Village Green Owners Ass'n*, 42 Cal.3d 490, 503-04 (Cal. 1986); 18B Am.Jur.2d, Corporations, §§ 1877-78; 3A Fletcher, *supra*, § 1137.

Cases which have found personal liability on the part of corporate officers have typically involved instances of direct personal participation, as where the defendant was the "guiding spirit" behind the wrongful conduct (*Marks v. Polaroid Corp.*, 237 F.2d 428, 435 (1st Cir. 1956)), or the "central figure" in the challenged corporate activity (*Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 605-06 (3d Cir. 1978)). The following example given by the Seventh Circuit is illustrative:

> If an individual is hit by a negligently operated train, the railroad is liable in tort to him but the president of the railroad is not. Or rather, not usually; had the president been driving the train when it hit the plaintiff, or had been sitting beside the driver and ordered him to exceed the speed limit, he would be jointly liable with the railroad. *Browning-Ferris Indus. of Ill., Inc. v. Ter Maat*, 195 F.3d 953, 956 (7th Cir. 1999).

Those courts which have expressly considered the issue have, consistent with the common law, underscored the need for a corporate owner's or officer's participation in the tort of the corporation or its agents in order for liability to adhere under the FHA and other civil rights statutes. *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1045 (N.D. Ohio 1998); *Heights Cmty. Cong. v. Hilltop Realty, Inc., supra,* 629 F. Supp. at 1303-04; see *Tillman v. Wheaton-Haven Recreation Ass'n, supra,* 517 F.2d at 1144 (42 U.S.C. §§ 1981, 1982).

For example, in *Hilltop, supra,* 629 F. Supp. 1232, the court found a realty corporation vicariously liable for the discriminatory conduct of its agents in violation of the FHA. *Id.*, at 1303. The court, however, found that the corporation's president and chief operating officer could not be held liable for the agents' conduct based on his status as a corporate officer. The court explained, "[Mr. Aveni's] status as president and chief operating officer in and of itself does not render him personally liable for the acts of the corporation or its agents or employees. [Citations.] To impose vicarious liability upon Mr. Aveni as president and chief operating officer for the acts of the Hilltop agents who participated in the continuing violation found by this court, it is essential to show that he participated in their acts or knew of and ratified their acts and statements." *Id.*, at 1304, footnote omitted.

Similarly, in *United States v. Lorantffy Care Center, supra,* 999 F. Supp. 1037, the court dismissed the individual corporate officers in an action brought under the FHA on the ground they had not participated in the tort of the corporation. The court held, "no individual may be held vicariously liable for a company pattern or practice simply because she is an officer or manager of the company. In

Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974), the Sixth Circuit did find that a company is liable for the acts and statements of its employees. But in that decision, and those within the Circuit that follow it, *courts apply the doctrine of vicarious liability to the company, not the company's officers.* [Citation]." 99 F. Supp. at 1045, emphasis added.

This interpretation of the FHA is consistent with the manner in which courts have read related civil rights statutes. For example, in *Tillman v. Wheaton-Haven Recreation Ass'n, supra,* 517 F.2d 1141, the Fourth Circuit was called upon to address the liability of corporate owners and officers under 42 U.S.C. §§ 1981 and 1982.[5] The question was whether the officers' status shielded them from liability under these statutes. *Tillman, supra,*

[5] The statutes provide in pertinent part:

42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

"[T]he Fair Housing Act and § 1982 stand as independent statutory remedies available to black plaintiffs against persons who refuse to sell them property because of their race." *Dillon v. AFBIC Dev. Corp.*, 597 F.2d 556, 561 (5th Cir. 1979).

517 F.2d at 1143. The court took as its starting point this Court's construction of 42 U.S.C. § 1983.[6] "[T]he Supreme Court held that § 1983, though cast in absolute terms, did not abolish the common law immunities granted some public officials in the performance of their duties." *Ibid*, citing *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Tenney v. Bandhove,* 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); see also *Imbler v. Pachtman, supra,* 424 U.S. at 417-18, 96 S.Ct. 984, 47 L.Ed.2d 128. "In short, the Court interpreted § 1983 as neither enlarging nor diminishing traditional immunities of public officials." *Tillman, supra*, 517 F.2d at 1143.

"Comparably, §§ 1981 and 1982 should be interpreted as neither enlarging nor diminishing the liability of directors under general corporation law for tortious acts performed nominally by the corporation." *Tillman, supra,* 517 F.2d at 1144. Thus, if a corporate owner or officer "does not personally participate in the corporation's tort, general corporation law does not subject him to liability simply by virtue of his office." *Ibid.*

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[6] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. The Owner Of A Corporation Is Not Liable For The Acts Of His Corporation Unless The Record Justifies Piercing The Corporate Veil.

Stockholders of a corporation are not liable for the acts of their corporation unless the record justifies piercing the corporate veil. *United States v. Bestfoods, supra,* 524 U.S. at 62-63, 118 S.Ct. at 1885; *Export Credit Corp. v. Diesel Auto Parts Corp.*, 502 F. Supp. 207 (S.D.N.Y. 1980); 18B Am.Jur.2d, Corporations, § 1829 (1985). The same rule applies in actions brought under the FHA. *Heights Cmty. Cong. v. Hilltop Realty, Inc., supra,* 629 F. Supp. at 1303, fn. 102.

The Court recently cautioned that "[o]ne-person corporations are authorized by law and should not lightly be labeled sham." *Nelson v. Adams USA, Inc.,* 529 U.S. 460, 471, 120 S.Ct. 1579, 1587 (2000). Thus, sole ownership of a corporation does not alone justify piercing the corporate veil and imposing personal liability.[7] *Williams v. McAllister Bros., Inc.*, 534 F.2d 19, 21 (2nd Cir. 1976).

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[7] Plaintiffs have made no claim that the corporate veil should be pierced, nor did they offer any evidence to support such a claim. Accordingly, the Court does not need to determine whether the relevant factors have been satisfied, or whether the "alter ego" elements have been met. See *Bucyrus Erie Co. v. General Products*, 643 F.2d 413, 418 (6th Cir. 1981); *United States v. Pisani*, 646 F.2d 83, 85 (3d Cir. 1981); *Heights Community Congress v. Hilltop Realty, Inc., supra,* 629 F. Supp. at 1303, fn. 102.

C. The Former HUD Regulation Relied On By The Court Of Appeals Does Not Support Imposition Of Vicarious Liability Under The FHA.

The court of appeals relied on a repealed HUD regulation for the investigation and conciliation of administrative complaints to support its expansionist reading of the FHA. J.A. 60-61. Specifically, the court relied on former, and now amended, 24 C.F.R. § 103.20(b) (1999) which provided in relevant part that "[a] complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale ... of dwellings." Pet. App. 63. Section 103.20, however, is no longer in effect. The regulation was amended prior to the court of appeals' decision to completely abolish any reference to liability of "any person" with "the right to direct or control the conduct of another person" with respect to housing as subject to a claim, and in so doing eliminated the very language relied on by the court of appeals to support its decision. 24 C.F.R. § 103.10 (2000); see also 24 C.F.R. §§ 103.15-20. Pet. App. 63-64.

Moreover, even if the Court were to look to the former HUD regulation for guidance (see *Gladstone Realtors v. Vill. of Bellwood,* 441 U.S. 91, 105-08, 99 S.Ct. 1601 (1979)), the court of appeals' elevation of the regulations to the level of expanding the common law was improper. To alter common law rules of limited liability requires a clear statement from Congress. *United States v. Bestfoods, supra,* 524 U.S. at 63, 118 S.Ct. at 1885. An administrative agency is powerless to effect that change through regulations, especially in the face of congressional silence. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, ___ U.S. ___, 122 S.Ct. 1864, 1882 (2002) (administrative agency "is not, constitutionally speaking, either a legislature or a court").

Indeed, the HUD regulations at issue expressly apply only to the procedure for investigation and conciliation of administrative complaints. 24 C.F.R. § 103.1.[8] They do not purport to expand civil liability. See *Walker v. Crigler,* 976 F.2d 900, 904 (4th Cir. 1992) (HUD regulations "do not cover the circumstances of the present case which is a private cause of action and not a complaint filed with HUD" [interpreting former § 103.20]). Nor could they. See *Fed. Mar. Comm'n v. S.C. State Ports Auth., supra,* 122 S.Ct. at 1882.

Finally, at the very most, the regulation (when it was in effect), addressed imposition of vicarious liability against *principals*. That is simply irrelevant to the question whether a corporate owner's or officer's limited liability under the common law can be disregarded based on actions of the corporation or its other agents.

II. PERSONAL LIABILITY OF CORPORATE OWNERS AND OFFICERS UNDER THE FHA CANNOT BE PREMISED ON THE THEORY OF A NONDELEGABLE DUTY.

A. The Concept Of Nondelegable Duty.

In *General Building Contractors Association v. Pennsylvania, supra,* 458 U.S. at 395, 102 S.Ct. at 3152-53, the

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[8] 24 C.F.R. § 103.1 provides in relevant part:

(a) This part contains the procedures established by the Department of Housing and Urban Development for the investigation and conciliation of complaints under section 810 of the Fair Housing Act, 42 U.S.C. § 3610.

Court described the concept of a nondelegable duty as imposing "upon the principal not merely an obligation to exercise care in his own activities, but to answer for the well-being of those persons to whom the duty runs." See Rest (2d) Torts, § 214.[9] "The duty is not discharged by using care in delegating it to an independent contractor. Consequently, the doctrine creates an exception to the common-law rule that a principal will not be liable for the tortious conduct of an independent contractor. [Citations.] So understood, a nondelegable duty is an affirmative obligation to ensure the protection of the person to whom the duty runs." *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 395-96, 102 S.Ct. at 3152-53.

The question presented is whether, as held by the court of appeals, the FHA imposes such an affirmative obligation on corporate owners or officers to prevent discrimination. Because the FHA in fact imposes no such duty, corporate owners and officers cannot be held personally liable simply because another agent of the corporation discriminates against a third party. They can only be liable for personal acts that are prohibited by the statute.

[9] Restatement Second Torts § 214 provides:

> A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.

B. The Court's Interpretation Of Related Civil Rights Statutes Has Rejected Imposition Of A Nondelegable Duty To Ensure Discrimination Does Not Occur.

In *General Building Contractor's Association v. Pennsylvania, supra,* 458 U.S. 375, 102 S.Ct. 3141, the Court decided a Title VII employment discrimination case under 42 U.S.C. § 1981.[10] The case was brought by a group of skilled, racial minority workers alleging exclusive hiring practices by a labor union, several trade associations, and member construction employers. 458 U.S. at 378. The plaintiffs alleged the union hiring hall systematically denied access to minority workers in favor of white workers. The complaint also alleged derivative liability of the trade association and individual employers for the union's discriminatory practices. 458 U.S. at 377, 380. The district court found the union's practices were discriminatory, holding the union liable and summarily imputing its illegal practices to the other defendants. 458 U.S. at 381.

In its opinion, the Court first discussed third party liability under respondeat superior and agency law. The Court determined there was no agency relationship between the trade association and the union because the union was not subject to the association's power to control. *Id.*, at 393-94.

The Court then addressed, and rejected, nondelegability, which was the alternative basis relied on by the district court as a basis for liability. The Court's inquiry focused on what duty the statute imposes:

[10] For text of 42 U.S.C. § 1981 see footnote 5, *supra*.

> In a sense, to characterize . . . a duty as "non-delegable" is merely to restate the duty. Thus, in this litigation the question is not whether the employers and associations are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is *what* duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to ensure that blacks enjoy such right? *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 396, 102 S.Ct. at 3153 (original emphasis).

To answer this question, the Court looked to the language of the statute:

> The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United States." *Id.*, at 396.

The Court concluded § 1981 imposes no such affirmative obligation to ensure that discrimination does not occur:

> We are confident that the Thirty-Ninth Congress meant to do no more than prohibit employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. It did not intend to make them the guarantors of the workers' rights as against third parties who would infringe them. [Citations.] *Id.*, at 396.

Although *General Building Contractors* arose under § 1981 and not the FHA, substantially the same analysis should apply to both. While § 1981 was enacted to prohibit discrimination in the making and enforcement of contracts, its companion, § 1982, applies to housing law.[11] The Court in *General Building Contractors* noted the close connection between the two statutes, including their common origin and evolution. *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 383-84 (indicating the common roots of §§ 1981 and 1982 in the Civil Rights Act of 1866).

Similarly, § 1982 and the FHA are often construed together, and most actions brought under the FHA are litigated under § 1982 as well. See, e.g., *City of Chicago v. Matchmaker Real Estate Sales Ctr.,* 982 F.2d 1086, 1096 (7th Cir. 1992); *Hamilton v. Svatik,* 779 F.2d 383, 385 (7th Cir. 1985); *Marr v. Rife, supra,* 503 F.2d at 736; *Dillon v. AFBIC Dev. Corp., supra,* 597 F.2d at 561-62. Indeed, so close are the similarities that courts often construe the two acts together, treating them as "independent statutory remedies available to black plaintiffs against persons who refuse to sell them property because of their race." *Dillon v. AFBIC Dev. Corp., supra,* 597 F.2d at 561; see also *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 416 and note 20, 88 S.Ct. 2186 (1968) (rejecting suggestion that the enactment of the FHA impliedly repealed or modified § 1982).

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[11] See footnote 5, *supra*.

C. The Text Of The FHA Does Not Reveal A Congressional Intent To Impose A Nondelegable Duty.

As explained by the Court in *General Building Contractors Association*, a determination of whether a statute imposes a nondelegable duty turns on the language of the statute. More precisely, what duty does the statute impose? *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 396, 102 S.Ct. at 3153. The FHA provides:

> [I]t shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. 42 U.S.C. § 3604(a).

The language of the statute does not speak in terms of "duties." See *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 396, 102 S.Ct. at 3153. The text does not mention the word "owner" or "officer" or any person at all. Instead, the focus of the FHA is on prohibitions, not affirmative duties. Moreover, the statute on its face does not state or even imply that the owner or officer of a corporation has an affirmative obligation to ensure nondiscrimination in the sale or rental of property. Cf., *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 396, 102 S.Ct. at 3153 (under § 1981, Congress "did not intend to make [employers] the guarantors of the worker's rights as against third parties who would infringe them"). Indeed, the FHA states no particular affirmative obligations at all. It only prohibits particular acts. Consequently, the nondelegability concept has no application. *Ibid.*; see also Joshua W. Dixon, Comment, *The Case Against a*

Nondelegable Duty on Owners to Prevent Fair Housing Violations, 69 U. Chi. L. Rev. 1293, 1307-09 (2002).

D. The Former HUD Regulation Relied On By The Court Of Appeals Does Not Support Imposition Of A Nondelegable Duty Under The FHA.

The pertinent HUD regulations for the investigation and conciliation of administrative complaints were discussed above. See Sec. I, C, *supra*. As relevant here, the regulation relied on by the court of appeals limited actions against principals and employers to situations where the discriminating subordinate was "acting within the scope of his or her authority as employee or agent of the directing or controlling person." See former 24 C.F.R. sec. 103.20(b)(1999); Pet. App. 63. By using "scope of authority" as a controlling factor, and rejecting a proposed version of the regulation which omitted this language, HUD clarified that traditional principles of agency, rather than strict liability based on a nondelegable duty, would apply to FHA cases. See *Walker v. Crigler, supra,* 976 F.2d at 907, citing 53 Fed. Reg. 24185 (1988), added emphasis ("*it is not HUD's intent to impose absolute liability on any principal*"); J. Dixon, *op. cit.* at 1293 ("[I]t would be anomalous to read the standard of liability in civil FHA claims to be a nondelegable duty while reading the standard in administrative claims to be agency principles").

III. THE COURT OF APPEALS IMPROPERLY RELIED ON STATE LAW FOR REGULATION OF OFFICER/BROKERS TO CREATE LIABILITY UNDER THE FHA.

To impose liability on Meyer as an officer/broker of Triad under the FHA, the court of appeals relied on California's statutory scheme for the licensing and discipline of designated officer/brokers.[12] J.A. 67-71. That state statutory scheme, which extends a disciplinary scheme rather than creating a private right of action, cannot be used to create liability under the FHA.

First, the state statutory scheme cannot be used to create substantive federal liability without direction from Congress. "[A]lthough Congress may have assigned to the process of judicial implication the task of selecting in any particular case appropriate rules from state law to supplement established federal law, the application of that process is restricted to those contexts in which Congress has in fact authorized resort to state and common law." *Moor v. Alameda County,* 411 U.S. 693, 701-702, 93 S.Ct. 1785, 1791-1792 (1973). This is not such a case.[13]

Second, even if the Court were to look to state law to create liability under the FHA, the California statute

[12] Meyer has not held a broker's license as an individual since the early 1980's, i.e., well before the incidents alleged in Plaintiffs' complaint. J.A.L. 3. At all relevant times, Triad was a corporate licensee, with Meyer designated as Triad's officer/broker. J.A.L. 3-4, 8.

[13] The Court gave the Federal Tort Claims Act, "under which the United States is made liable for certain torts of its employees under relevant state law," as an example of such federal adoption of state law. *Moor v. Alameda County, supra,* 411 U.S. at 701, fn. 11.

provides no such basis. California Business and Professions Code section 10159.2 provides in relevant part:

> The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

This statute does not create a private right of action against an individual based solely upon his status as a designated broker. Rather, section 10159.2 is intended

> "to include only disciplinary sanctions on the individual broker. Nothing in the statutory scheme of the Real Estate Act, or the plain language of § 10159.2, suggests that it creates a private right of action against the designated broker, particularly in light of detailed provisions for disciplinary sanctions set forth in §§ 10175-10185. The most obvious interpretation of § 10159.2 is that it simply extended this disciplinary scheme to apply against designated brokers who failed to properly supervise employees. [Citation.]"

In re Grabau, 151 B.R. 227, 332 (1993); see also *Walters v. Marler*, 83 Cal.App.3d 1, 35 (1978) ("Any action by the qualifying broker . . . must be regarded as an action by the corporation and not by the broker as an individual").

Third, the court of appeals' opinion holding an officer/broker personally liable under the FHA conflicts with authority from other circuits holding that an individual is not personally liable based on that status. *Heights Community*

Congress v. Hilltop Realty, Inc., supra, 629 F. Supp. at 1303. In *Hilltop*, the court held that a licensed broker, in that case a corporation, was "liable for the imputed acts and statements" of those agents operating under the corporation's license in violation of the FHA. 629 F. Supp. at 1303. The plaintiffs also sought to attach personal liability to the owner/president of the corporation. The court held that, since the agents who committed the discriminatory acts had a "contractual relationship with [the corporation] as broker and not with [the owner/president] as broker, [the agent's] acts and statements could not be imputed to [the owner/president]." *Id.*, at 1303-04.

So too here, Meyer – who did not hold an individual broker's license – cannot be held liable based on his status as Triad's designated officer/broker.

IV. THE COURT OF APPEALS' EXPANSION OF LIABILITY IS NOT WARRANTED BY THE POLICY UNDERLYING THE FHA TO PREVENT DISCRIMINATION IN HOUSING.

The declared policy of the FHA is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The Fourth Circuit interpreted this policy as indicating that "the one innocent party with the power to control the acts of the agent, the owner of the property or other responsible superior, must act to compensate the injured party for the harm, and to ensure that similar harm will not occur in the future." *Walker v. Crigler, supra,* 976 F.2d at 904-05; accord, *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., supra,* 982 F.2d at 1096-97.

The court of appeals relied on this language as providing the policy justification for its holding that corporate owners and officers may be liable for an employee's violation of the FHA, whether or not the owners or officers directed, authorized, or even knew of the particular acts that occurred. JA 62-63. It does not provide such a policy justification.

Plaintiffs who are victims of alleged violations of the FHA are not without recourse under established principles of agency and corporate law. They can pursue their action against the agent who is directly liable for the alleged discrimination, as well as against the "one innocent party with the power to control the acts of the agent," i.e., the corporation. No legitimate policy is furthered by allowing plaintiffs to pursue an innocent officer/owner as well. To the contrary. Allowing plaintiffs to proceed against an innocent corporate owner or officer simply because he is a perceived "deep pocket" is inimical to notions of fair play and substantial justice, and in no way furthers the actual laudable policy underlying the FHA or the victim's legitimate right to recovery.

Indeed, public policy favors an adherence to common law rules governing corporate form and liability. While this case involves a small real estate company with perhaps five sales agents, the same corporate structure governs many real estate firms, from tiny "Mom and Pop" operations to corporate giants that may hire thousands of agents nationwide. For example, in California alone, there are more than 15,000 corporate real estate broker licenses, and just over 17,000 individuals licensed as corporate broker/officers. A full 45 percent of all real estate sales persons in the state work for these corporate brokers. (See

Brief of *amicus curiae* California Association of Realtors in support of petition for writ of certiorari at 5.)

Now, unless the court of appeals' opinion is corrected by this Court, each owner and officer can be *personally* liable for the acts of all those agents. What sane individual would take on that responsibility? Yet without officers and owners, none of these real estate corporations could continue to function. The results will be catastrophic. See *Anderson v. Abbott*, 321 U.S. 349, 361-62, 62 S.Ct. 531, 537-38 (1944) ("[T]he corporation is an insulator from liability from creditors. . . . Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.")

By holding a corporate owner or officer personally liable for the conduct of the corporation or its other agents, whether or not the individual directed, authorized, or even knew of the particular discriminatory conduct, the court of appeals' decision has, without exaggeration, opened the floodgates of litigation throughout the country. Such a holding is not in the interests, and should not be the law, of this nation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Dated: August 2, 2002

BROWN & PEEL
JAMES W. PEEL
3585 West Beechwood
Suite 101
Fresno, California 93711
(559) 431-1300

BENEDON & SERLIN
DOUGLAS G. BENEDON*
GERALD M. SERLIN
21700 Oxnard Street,
Suite 1290
Woodland Hills, California
91367
(818) 340-1950
**Counsel of Record*

No. 01-1120 (14)

In The

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

BRANCART & BRANCART
ELIZABETH BRANCART*
CHRISTOPHER BRANCART
Post Office Box 686
Pescadero, California 94060
(650) 879-0141
(650) 879-1103 Fax

Attorneys for Respondents

**Counsel of Record*

BENEDON & SERLIN
DOUGLAS G. BENEDON*
GERALD M. SERLIN
21700 Oxnard Street
Suite 1290
Woodland Hills, California 91367
(818) 340-1950
(818) 340-1990 Fax

Attorneys for Petitioner

[Additional Counsel Listed On Inside Cover]

Petition For Certiorari Filed January 28, 2002
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ROBERT G. SCHWEMM
College of Law, Room 209
University of Kentucky
Lexington, Kentucky 40506
(859) 257-6013

LAW OFFICE OF
GREG ALEXANIAN
GREG ALEXANIAN
10154 Riverside Drive
Toluca Lake, California
91602
(818) 760-3386

Attorneys for Respondents

BROWN & PEEL
JAMES W. PEEL
3585 West Beechwood
Suite 101
Fresno, California 93711
(559) 431-1300

Attorneys for Petitioner

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RELEVANT DOCKET ENTRIES

U.S. District Court

Central District of California (Western Div.)

* * *

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* * *

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* * *

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* * *

BRANCART & BRANCART
Christopher Brancart (SBN 128475)
Liza Cristol-Deman (SBN 190516)
Post Office Box 686
Pescadero, California 94060
Tel: (650) 879-0141
Fax: (650) 879-1103

THE LAW OFFICE OF GREG ALEXANIAN
Greg Alexanian (SBN 183161)
10061 Riverside Drive, Suite 723
Toluca Lake, California 91602
Tel: (818) 760-3386
Fax: (818) 752 8221
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public,	**Case No. 98-7965 CM (Mcx)**
Plaintiffs,	**FIRST AMENDED COMPLAINT FOR MONETARY, DECLARATORY, AND INJUNCTIVE RELIEF; DEMAND FOR JURY TRIAL**
vs.	(Filed Oct. 19, 1998)
DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD INC., doing business as TRIAD REALTORS,	
Defendant.	

I. INTRODUCTION

1. In this action, Emma Mary Ellen Holley, David Holley, Michael Holley, and Brooks Bauer seek monetary, declaratory and injunctive relief against defendant for discriminating against African Americans on the basis of race or color in the sale of housing in violation of the federal Fair Housing Act, the federal Civil Rights Act of 1866, related state anti-discrimination laws, and other state laws. Plaintiff Brooks Bauer also seeks monetary and declaratory relief against defendant for breach of his fiduciary duty owed to Mr. Bauer.

II. JURISDICTION AND VENUE

2. Jurisdiction is conferred on this Court by 42 U.S.C. section 3613 and by 28 U.S.C. section 1331. This Court has supplemental jurisdiction pursuant to 28 U.S.C. section 1367 to hear and determine plaintiffs' state law claims because those claims are related to plaintiffs' federal law claims and arise out of a common nucleus of related facts. Plaintiffs' state law claims are related to plaintiff's federal law claims such that those claims form part of the same case or controversy under Article III of the United States Constitution.

3. Venue is proper under 28 U.S.C. section 1391 in that the claims alleged herein arose within Twenty-Nine Palms, California.

III. PARTIES

4. Plaintiffs Emma Holley, David Holley, and Michael Holley (hereinafter "the Holleys") reside in Twenty-Nine Palms, California. Emma Holley and David Holley are a married couple. The Holleys are all citizens of the

United States. Mrs. Holley is African American. Mr. Holley is white. Their son by adoption, Michael, is African American.

5. Plaintiff Brooks Bauer (hereinafter "Mr. Bauer") resides in Twenty-Nine Palms, California. He is a general building contractor doing business in Twenty-Nine Palms, California. Mr. Bauer is a citizen of the United States.

6. Defendant David Meyer is the designated officer and broker under which Triad, Inc. (hereinafter "Triad"), a California real estate corporation located at 73421 29 Palms Highway, in Twenty-Nine Palms, California, is owned and operated. Triad is the corporate licensee of a broker's license under license number 00351288. Mr. Meyer is the designated officer and broker for that license. Mr. Meyer is president and designated officer/broker of Triad, which is engaged in the business of selling homes to members of the public. Mr. Meyer resides in Twenty-Nine Palms, California and is a real estate broker responsible for the operation of his brokerage, Triad. With respect to the federal law claims alleged herein, Mr. Meyer is sued in his individual capacity and in his capacity as president and designated officer/broker of Triad Inc., doing business as triad Realtors. With respect to claims six, seven and eight alleged herein, Mr. Meyer is sued only in his capacity as president and designated officer/broker of Triad Inc., doing business as Triad Realtors. With respect to all other claims alleged herein, Mr. Meyer is sued individually and in his capacity as president and designated officer/broker of Triad Inc., doing business as Triad Realtors.

IV. FACTS

A. INTRODUCTION

7. Defendant, acting through his agents, has engaged in a pattern or practice of discrimination against African Americans, including plaintiffs, on account of race or color in the sale of houses. Defendant or his agents have pursued this pattern or practice of racial discrimination for the purpose or with the effect of excluding African Americans from residing in certain houses in the twenty-Nine Palms area. Defendant or his agents continue to engage in such a pattern or practice of discrimination so as to constitute a continuing violation.

8. The pattern or practice of discrimination, committed by defendant or his agents, against African Americans, including plaintiffs, includes, but is not limited to committing the following discriminatory housing practices:

A. Refusing to sell or negotiate to sell homes because of race or color;

B. Failing to process an offer for the sale of a dwelling or to communicate an offer accurately because of race or color;

C. Discouraging any person from inspecting or purchasing a dwelling because of race or color;

D. Failing to accept or consider a bona fide offer because of race or color;

E. Using words or phrases which convey that dwellings are available or not available to particular groups of persons because of race or color;

F. Using different qualification criteria or applications, or sale standards or procedures, because of race or color;

G. Expressing to agents, brokers, employees, prospective sellers or to any other persons a preference for or limitation on any purchaser because of race or color;

H. Indicating through words or conduct that a dwelling which is available for inspection or sale has been sold because of race or color;

I. Limiting information, by word or conduct, regarding suitably priced dwellings available for inspection or sale because of race or color;

J. Providing false or inaccurate information regarding the availability of a dwelling for sale to any person, regardless of whether such person is actually seeking housing, because of race or color; and,

K. Coercing a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with the sale of a dwelling or in connection with a residential real estate-related transaction because of race or color.

9. Defendant, acting in his capacity as president and designated officer/broker of Triad, has breached his fiduciary duty as plaintiff Brooks Bauer's agent to act in Mr. Bauer's best interests as the listing agent for the sale of Mr. Bauer's house and to use his best efforts to procure a buyer for Mr. Bauer's house. Mr. Meyer has violated his fiduciary duties of care and diligence and his duty to

disclose to the Mr. Bauer all offers to purchase Mr. Bauer's house.

10. Defendant, acting in his capacity as president and designated officer/broker of Triad, has tortiously interfered with an economic relationship with prospective economic advantage causing damage to plaintiffs.

11. In the alternative, defendant, acting in his capacity as president and designated officer/broker of Triad, has negligently interfered with an economic relationship with prospective economic advantage causing damage to plaintiffs.

12. In the alternative, defendant has negligently failed to hire, train, supervise, and discipline his employees and agents regarding their duties under state and federal fair housing laws.

B. THE HOLLEYS' COMPLAINT

13. At all times relevant herein, the Triad real estate firm was owned and operated by Mr. Meyer, who served and continues to serve its president and designated officer/broker. Triad received its license to operate a real estate brokerage company under Mr. Meyer's broker's license and continues to operate under that license. As a corporate licensee, Triad cannot conduct business unless an officer who is licensed by the State of California as a broker serves as an officer and designated officer/broker of Triad. Mr. Meyer is the only officer or employee of Triad who has a broker's license. Triad pays taxes under Mr. Meyer's tax identification number. As the president and broker of Triad, the agents and employees of Triad, including Grove Crank, Terry Stump and Lois Carrol, ultimately

report to Mr. Meyer. Each agent of Triad, including Grove Crank, Terry Stump and Lois Carrol, is employed by Triad under the supervision or direction of Mr. Meyer in his capacity as its broker and president.

14. In October 1996, the Holleys began looking in Twenty-Nine Palms for a home to purchase. On or around October 7 or 8, 1996, they visited the Twenty-Nine Palms office of Triad Realtors. There, they met with Triad salesperson Grove Crank and asked him if he had any listings for new or nearly new houses for sale in the area that fit their needs and price range. They stated that they were interested in purchasing a house in the $100,000 to $150,000 price range.

15. Mr. Crank then took them to see four houses in Twenty-Nine Palms that Triad listed for sale. None of these houses was listed for under $150,000. Although they were told to make an offer on a house listed at $178,000, they determined that this house did not meet their needs. They returned to the office of Triad Realtors after viewing these homes and requested that Mr. Crank inform them if any houses meeting their requirements were added to Triad's listings. No one from Triad ever called the Holleys with such information.

16. In approximately mid to late November of 1996, the Holleys were on their way to visit friends when they spotted a house at 73972 Whitesands with Triad Realtors' "for sale" sign in the front yard. The Holleys had never been informed about this house by Triad, and were interested in getting more information about it. Soon thereafter, Mr. and Mrs. Holley went to the Triad office to find out the asking price of the house and other details. The only salesperson in the office at the time, Ms. Terry

Stump, informed the Holleys that the asking price was $145,000. Ms. Stump made an appointment for Mrs. Holley to view the house on the following Tuesday at 10:00 a.m.

17. On the following Monday, Mrs. Holley called Ms. Stump and asked to reschedule the appointment to view the house. Ms. Stump agreed to show the Holleys the house later that morning, at 10:00 a.m. Mr. and Mrs. Holley were met by Ms. Stump at the house at 10:00 a.m. Mrs. Holley's sister Clara Pullen and her friend Cherie Hughes were also present. Ms. Stump opened the doors to the house and began showing them the interior. At approximately 10:20 a.m., Lois Carroll, another Triad salesperson who lived down the street, entered the house. Ms. Carroll stated, "Oh, it's you; I was driving around and saw the door open and came to investigate to see if someone had broken in," or words to that effect. Ms. Carroll and Ms. Stump talked in the kitchen area, while the Holleys finished touring the house. When the Holleys returned to the kitchen area, Ms. Carroll said to Ms. Stump, "I'll see you in the office," or words to that effect. She then left.

18. As the Holleys left the house with Ms. Stump, Ms. Stump inquired as to whether the Holleys intended to make an offer on the house. Mrs. Holley stated that she and her husband were in the process of selling a house in the city, and wished to pay cash for a new house following the close of escrow on the city home. She further stated that she wanted to offer the builder $5,000 to hold the house until April or May of 1997, when the Holleys expected to close the escrow on the city house. Ms. Stump replied, it "sounds like a fair deal," or words to that effect. Ms. Stump and Mrs. Holley agreed to meet the following

morning to write up the offer to hold and subsequently purchase the Whitesands house.

19. That same evening at approximately 6:00 p.m., Mrs. Holley called Brooks Bauer, the builder of the house on Whitesands. She informed Mr. Bauer that she had toured the house and was interested in purchasing it. She stated that she and her husband were in the process of selling a house in another city and would not be able to close the sale on Mr. Bauer's house until after the sale of the other house was completed. She further stated that they wanted to offer full price, and would offer to place $5,000 in an escrow account to hold the property while they were closing the sale on their other house. She stated that they would pay cash. Mr. Bauer then answered Mrs. Holley's questions regarding the construction of the house, and stated that he looked forward to receiving her offer. He also informed her that her offer sounded "pretty good," but that the offer would have to go through Triad Realtors. Mrs. Holley replied that she was going to Triad the following day to write up the offer.

20. Mr. Bauer telephoned Grove Crank at home that same evening to tell him of Mrs. Holley's intentions. He spoke to Mr. Crank personally, but did not discuss the terms of the offer with him. He indicated to Mr. Crank that he looked forward to receiving the Holleys' offer.

21. At approximately 7:00 p.m. on the same evening, Ms. Stump called the Holley residence. Ms. Stump told Mrs. Holley that she had spoken with a few people in the office, and that "they felt that $5,000 was not enough money to ask him to hold the house for six months," or words to that effect. Ms. Stump stated that they felt that $6,000-$7,000 was necessary to hold the house. She also

stated that Mrs. Holley should be sure to bring the money when she came to the office the following day to write up the offer. Mrs. Holley was surprised, but responded "OK," or words to that effect. Following the conversation, Mr. and Mrs. Holley discussed what had happened and decided not to raise their offer to hold the property above $5,000.

22. At approximately 10:00 a.m. on the following day, Mr. and Mrs. Holley arrived at the Triad office. They informed Ms. Stump that they did not wish to raise their offer. Ms. Stump replied that after talking with the others on Monday afternoon, they decided that $5,000 was "too low and unfair" to present to the builder, or words to that effect. Mrs. Holley asked Ms. Stump with whom she had discussed the matter. Ms. Stump stated, "the older realtors in the office," or words to that effect. Mrs. Holley then asked, "You mean Lois [Carroll] and Grove [Crank]?" Ms. Stump nodded affirmatively.

23. The Holleys informed Ms. Stump that they did not think that the realtors had any right to control the offer the Holleys made to the builder, however unfair the realtors thought the offer was. The Holleys stated that the builder should decide whether to accept or reject their offer. Ms. Stump responded that she felt their offer was unfair. The Holleys asked her to explain why her attitude about the offer had changed over the past 24 hours. She responded, "I'm a new agent in the office and still have to check with the older agents," or words to that effect. The Holleys then stated that she had no right to tell them to bring their money into the office, since they had not yet formalized the offer and presented it to the builder. They said that they would not agree to present an offer based on the new terms.

24. Ms. Stump then asked if they would be interested in seeing any other houses. They replied that they did not think so. Ms. Stump stated that they still had "two lovely homes on the golf course," or words to that effect. The Holleys said, "No, thanks."

25. After leaving the Triad office, Mr. and Mrs. Holley changed their minds and decided to drive by the two homes on the golf course that Ms. Stump had just mentioned. They drove directly to the homes. After walking around the exterior of the homes, they decided that they would like to tour the home located at 4632 Saddlehorn. They drove to the nearest pay phone and called the Triad office. Mrs. Holley spoke with Ms. Stump and informed her that they would like to see the house at 4632 Saddlehorn. Ms. Stump replied that the house had been sold. Mrs. Holley asked if it had been sold within the last hour. Ms. Stump relied that she had not known that the house was sold when she told the Holleys about it approximately one hour earlier. Ms. Stump asked if they wished to see the other one for sale. Mrs. Holley replied that they were really interested in the one at 4632. Ms. Stump replied, "I'll have to check to see if I can still show it and get back to you," or words to that effect.

26. Ms. Stump called the Holley residence at approximately 12:30 the same day and stated that she could still show the home at 4632 Saddlehorn. They agreed to meet at the home at 4:00 p.m. the same day. At approximately 4:00 p.m., the Holleys met Ms. Stump to look at the home. Ms. Stump repeated that it was sold, and asked again if they wished to see the one for sale down the street. The Holleys declined.

27. After viewing the home at 4632 Saddlehorn, the Holleys had no further communications with Triad. They received no information about additional houses for sale. Having found no suitable ready-made house in the area, the Holleys contracted with a builder to build their own home on April 9, 1997. However, the Holleys have issued a stop work order on their new home because the construction does not conform to the specifications in the blueprints.

C. BROOKS BAUER'S COMPLAINT

28. In approximately August of 1995, Mr. Bauer hired Triad by an agreement to act as his agent to sell the real property owned by Mr. Bauer, located at 73972 Whitesands in 29 Palms.

29. Mr. Bauer was never contacted by Grove Crank, David Meyer, or any individual affiliated with Triad regarding the Holleys' offer to purchase his house.

30. Approximately one week after he spoke with Mrs. Holley about her intent to make an offer on his home, Mr. Bauer stopped by Triad's office to inquire about the status of the matter. He met with Grove Crank. Mr. Crank stated, "No, you don't want to fuck with those niggers," or words to that effect. Mr. Bauer was stunned and offended. He replied to the effect that he did not care what color their skin was, since their money was green. Mr. Crank said, "No, that's a salt and pepper team," or words to that effect. He also stated that the Holleys were not interested in Bauer's house, and were either looking at other houses or had found another house. Mr. Bauer did not take any further action at this time because he assumed that the

Holleys had changed their mind about making an offer to purchase his house.

31. One or about April 23, 1997, Mr. Bauer learned that a family matching the Holley's description was building a house in the area. Later on the same day, Mr. Bauer called the Holleys and left a message on their answering machine asking them to return his call. Mrs. Holley called him later that evening. Mr. Bauer informed her that he had lowered the asking price on his Whitesands house, and asked if she and her husband might still be interested in purchasing it. Mrs. Holley replied that they were going to have a house built, the plans for which were in the process of being finalized. She also stated, "Triad cost you the sale of your house. We wanted to buy it," or words to that effect. Mr. Bauer asked her what she meant. She told him that Triad had not informed her that his house was on the market; instead, the Holleys happened to see it when they were driving through the neighborhood one day. She also stated that the Holleys felt discouraged in their attempt to purchase the house. Mr. Bauer apologized for Triad's actions and was disturbed by what Mrs. Holley had said about Triad.

32. On or about April 24, 1997, Mr. Bauer called Mrs. Holley to discuss the matter further. Mr. Bauer told Mrs. Holley that he believed that she may have been the victim of discrimination. On or about May 21, 1997, she contacted the San Bernardino Fair Housing Council to file a complaint against Triad.

33. One or about June 21, 1997, the California Association of Realtors referred Mr. Bauer to the San Bernardino Fair Housing Council in order to report the events that had transpired.

34. In approximately May of 1997, Mr. Bauer's escrow closed on the house located at 73972 White Sands. The house sold for the amount of $125,000, $20,000 less than the amount the Holleys would have paid.

D. INJURIES

35. By reason of defendant's unlawful acts or practices, each plaintiff has suffered loss of an important housing opportunity, violation of their civil rights, injury to their property, and severe emotional distress and physical injury, including humiliation, mental anguish, and attendant bodily injury, such as stomach aches, headaches, and sleep loss, and other special and general damages according to proof. Accordingly, they are entitled to compensatory damages.

36. By reason of defendant's unlawful acts or practices, plaintiff Brooks Bauer has lost the sale of his house. Instead of selling the home in November to the Holleys for $145,000, Mr. Bauer sold the home in April for $125,000. Mr. Bauer also continued to pay the costs associated with carrying property insurance for the months between November and April, and the interest on the loan he took out to purchase the property and build the home. Accordingly, he is entitled to compensatory damages.

37. In doing the acts of which plaintiffs complain, defendant acted with oppression, fraud and malice, and with wanton and conscious or reckless disregard of the rights of plaintiffs. Accordingly, plaintiffs are entitled to punitive damages.

38. There now exists an actual controversy between the parties regarding defendant's duties under the federal

and state fair housing laws. Accordingly, plaintiffs are entitled to declaratory relief.

39. Unless enjoined, defendant or his agents will continue to engage in the unlawful acts and the pattern or practice of discrimination described above. Plaintiffs have no adequate remedy at law. Plaintiffs are now suffering and will continue to suffer irreparable injury from the acts and the pattern or practice of discrimination, committed by defendant or his agents, against African Americans unless relief is provided by this Court. Accordingly, plaintiffs are entitled to injunctive relief.

V. CLAIMS

A. FIRST CLAIM

[Fair Housing Act]

40. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of the complaint herein.

41. Defendant violated the Fair Housing act when defendant or his agents injured plaintiffs by committing the following discriminatory housing practices:

A. Refusing to sell a dwelling because of race or color, in violation of 42 U.S.C. section 3604(a);

B. Discriminating in the terms, conditions, and privileges of the sale of a dwelling because of race or color, in violation of 42 U.S.C. section 3604(b);

C. Making statements with respect to the sale of a dwelling which indicated a preference, limitation, or discrimination based on race or color, in violation of 42 U.S.C. section 3604(c);

D. Representing to persons because of their race or color that a dwelling is not available for inspection or sale when such dwelling is in fact available, in violation of 42 U.S.C. section 3604(d);

E. Discriminating in residential real estate-related transactions because of race or color, in violation of 42 U.S.C. section 3605(a); and,

F. Coercing or interfering with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of rights guaranteed by the Fair Housing Act, in violation of 42 U.S.C. section 3617.

B. SECOND CLAIM

[Civil Rights Act of 1866]

42. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of the complaint herein.

43. Defendant violated the Civil Rights Act of 1866, 42 U.S.C. section 1982, when defendant or his agents injured plaintiffs by discriminating against plaintiffs in the sale of housing because of race or color.

C. THIRD CLAIM

[California Fair Employment and Housing Act]

44. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of the complaint herein.

45. Defendant violated the California Fair Employment and Housing Act when defendant or his agents

injured plaintiffs by committing the following discriminatory housing practices:

A. Discriminating in the sale of housing because of race or color, in violation of California Government Code section 12955(a) and (d);

B. Making, printing, or publishing or causing to be made, printed or published any notice, statement or advertisement that indicates any preference, limitation, or discrimination based on race or color, in violation of California Government Code section 12955(c);

C. Discriminating in real estate-related transactions because of race or color, in violation of California Government Code section 12955(i); and,

D. Otherwise making unavailable or denying a dwelling based on discrimination because of race or color, in violation of California Government Code section 12955(k).

D. FOURTH CLAIM

[California Unruh Civil Rights Act]

46. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of the complaint herein.

47. Defendant violated the Unruh Civil Rights Act, California Civil Code section 51 *et seq.*, when defendant or his agents injured plaintiffs by discriminating against plaintiffs in the operation of Triad Inc. or Triad Realtors, a business establishment, because of race or color.

48. Pursuant to the Unruh Civil Rights Act, plaintiffs are entitled to statutory damages, among other

remedies, of up to three times their actual damages as determined by the trier of fact, but no less than $1000.00 for each violation.

E. FIFTH CLAIM

[Unfair Business Practices]

49. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of the complaint herein.

50. In acting as herein alleged, defendant or his agents have engaged in a pattern or practice of unlawful discrimination in the operation of Triad, Inc., a business establishment, and therefore have engaged in acts of unfair competition as the same is defined in section 17200 of the Business & Professions Code.

51. In bringing this action for relief, plaintiffs are acting in the interest of themselves and the general public pursuant to the California Business and Professions Code section 17204.

F. SIXTH CLAIM

[Breach of Fiduciary Duty to Plaintiff Brooks Bauer]

52. Plaintiff Brooks Bauer realleges and incorporates by reference paragraphs 1 through 39 of the complaint herein.

53. As plaintiff Brooks Bauer's agent, defendant owed Mr. Bauer a fiduciary duty to:

A. Use due care and diligence to sell the real property owned by the principal, Brooks Bauer;

B. Disclose all offers of purchase to the principal, Brooks Bauer;

C. Ensure that all his agents were properly supervised and trained regarding their duties under state and federal fair housing laws and state real estate laws.

54. In acting as herein alleged, defendant breached these fiduciary duties as plaintiff Brooks Bauer's agent.

55. As a result of defendant's beach of these fiduciary duties, plaintiff Brooks Bauer has been damaged in that Mr. Bauer could have sold the property for a higher price but for defendant's actions or omissions.

G. SEVENTH CLAIM

[Tortious Interference with Economic Relationship]

56. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of the complaint herein.

57. An economic relationship existed between Brooks Bauer and the Holleys that contained probable future economic benefits for Mr. Bauer and the Holleys.

58. Defendant or his agents knew of the prospective economic relationship between Mr. Bauer and the Holleys.

59. Defendant or his agents intentionally engaged in wrongful acts or conduct designed to interfere with the prospective economic relationship between Mr. Bauer and the Holleys.

60. As a result of defendant's or his agents' conduct, the economic relationship between Mr. Bauer and the Holleys was disrupted.

H. EIGHTH CLAIM

[Negligent Interference with Economic Relationship]

61. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of the complaint herein.

62. An economic relationship existed between Brooks Bauer and the Holleys that contained probable future economic benefits for Mr. Bauer and the Holleys.

63. Defendant or his agent knew or should have known of the prospective economic relationship between Mr. Bauer and the Holleys, and were aware, or should have been aware that if they did not act with due care their actions would interfere with that relationship and cause plaintiffs to lose the probable future economic benefit of the relationship.

64. Defendant or his agents were negligent and failed to exercise due care.

65. The negligence of defendant's or his agents' disrupted the potential economic relationship between Mr. Bauer and the Holleys.

66. As a legal result of defendant's or his agents' conduct, plaintiffs have suffered economic losses, humiliation, mental anguish, severe emotional distress and severe personal injury, including bodily injury such as headaches, stomach aches and loss of sleep, and other special and general damages according to proof.

I. NINTH CLAIM

[Statutory Negligence]

67. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of the complaint herein.

68. Defendant engaged in acts in violation of California Business & Professions Code sections 10177(h) and 10159.2. Defendant's violation of such statutes proximately caused injury to plaintiffs so as to constitute statutory negligence.

69. Defendant's violation of section 10177(h) and 10159.2 of the California Business & Professions Code, which were designed to protect members of the public, has proximately caused injury to plaintiffs as to constitute statutory negligence.

70. As a legal result of defendant's statutory negligence, plaintiffs have suffered humiliation, mental anguish, severe emotional distress and severe personal injury, including bodily injury such as headaches, stomach aches and loss of sleep, and other special and general damages according to proof.

J. TENTH CLAIM

[General Negligence]

71. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of the complaint herein.

72. Defendant owed plaintiffs a duty to operate Triad in a manner that is free from unlawful discrimination, and to hire, train, supervise and discipline employees and agents to fulfill that duty. Defendant negligently violated that duty by discriminating against African

Americans on account of their race or color. Defendant's violation of that duty was the result of negligence, including but not limited to:

A. Defendant's negligent failure to train employees and agents regarding the requirements of state and federal fair housing laws;

B. Defendant's negligent failure to hire persons who were familiar with the requirements of state and federal fair housing laws; and,

C. Defendant's negligent failure to supervise employees and agents regarding compliance with the requirements of state and federal fair housing laws.

73. As a legal result of defendant's negligent conduct, plaintiffs have suffered loss of an important housing opportunity, violation of their civil rights, injury to their property, and bodily injury, including severe humiliation, physical and emotional distress.

VI. RELIEF

Wherefore, plaintiffs pray for entry of a judgment against defendant that:

1. Awards compensatory and punitive damages according to proof;

2. Declares that defendant has violated the provisions of the applicable federal and state fair housing laws;

3. Declares that defendant has committed the torts alleged herein;

4. Enjoins all unlawful practices complained about herein and imposes affirmative injunctive relief requiring

defendant, his partners, agents, employees, assignees, and all persons acting in concert or participating with him, to take affirmative action to provide equal housing opportunities to all home buyers and prospective home buyers regardless of race or color;

5. Awards up to three times the amount of actual damages for plaintiffs against defendant pursuant to the Unruh Civil Rights Act;

6. Awards costs of this action, including reasonable attorneys' fees; and,

7. Awards all such other relief as the Court deems just.

Dated: October 16, 1998.

BRANCART & BRANCART

/s/ Liza Cristol-Deman
Liza Cristol-Deman
Attorneys for Plaintiffs

VII. JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, plaintiff hereby requests a jury trial.

Dated: October 16, 1998.

BRANCART & BRANCART

/s/ Liza Cristol-Deman
Liza Cristol-Deman
Attorneys for Plaintiffs

[Proof Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public Plaintiffs, v. DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD INC., doing business as TRIAD REALTORS Defendant.	CV-98-7965-WMB ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS (Filed Mar. 17, 1999)

I. BACKGROUND

Emma Mary Ellen Holley, David Holley, Michael Holley ("Holleys") and Brooks Bauer ("Bauer") (collectively "plaintiffs") filed a complaint on November 14, 1997, alleging that Grove Crank Sr. ("Crank") and Triad Realtors ("Triad") (collectively "defendants") violated federal and state fair housing laws by discriminating against plaintiffs on the basis of their race during an attempt by the Holleys to purchase a house. Plaintiffs also sued David Meyer ("Meyer") in a separate action that nevertheless covered the same allegations and added several new claims. This Court has consolidated the two cases.

Plaintiffs allege that in October 1996, the Holleys visited the Twenty-Nine Palms office of Triad Realtors. There, they met with Triad agent Crank and inquired about listings for new houses in the $100,000 to $150,000 range. Crank took the Holleys to see 4 houses in the area, all of which were above $150,000. In mid-November 1996, the Holleys located a home on their own that happened to be listed with Triad. When the Holleys asked about that house, Ms. Terry Stump ("Stump") a Triad agent, informed them that the asking price for the house was $145,000.

The Holleys wished to make an offer to purchase the house at the listed price, but they wanted to wait until they closed escrow on their existing home. The Holleys indicated to Stump that they would put $5000 in escrow for the builder to hold the house until April or May 1997. Stump told the Holleys that their offer seemed fair. Mrs. Holley also called Bauer, the builder of the house, to tell him that they would offer to pay the listed price for the house, and pay $5000 to hold the house until their escrow closed. Bauer indicated that he thought it seemed fair, but told the Holleys that the offer must go through Triad.

Later, Stump called Mrs. Holley to tell her that other people in the Triad office felt that $5000 was not enough money to get the builder to hold the house for six months. The Holleys decided not to raise their offer, and Stump said that the offer would not be presented to the builder. Stump indicated that Crank and Lois Carroll were the agents in the office who determined that the offer was too low, and that as a newer agent, she had to follow their instructions. The Holleys told Stump that the builder should be able to decide if the offer was fair.

One week later, Bauer stopped by the Triad office to find out the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys and called them a "salt and pepper team." Bauer and the Holleys filed a complaint against Triad with the San Bernardino Fair Housing Council.

In November 1997, Plaintiffs also filed six claims against defendants in this Court: (1) violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3604; (2) violation of 42 U.S.C. § 1982; (3) violation of the California Fair Employment and Housing Act, Cal. Gov. Code § 12955; (4) violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51; (5) unfair business practices in violation of Cal. Bus. & Prof. Code § 17200; and (6) negligence. In October 1998, the plaintiffs asserted four additional claims against Meyer: (1) breach of fiduciary duty to plaintiff Bauer; (2) tortious interference with economic relationship; (3) negligent interference with economic relationship; and (4) violation of the California statutory negligence provisions, Cal. Bus. & Prof. Code §§ 10177(h) & 10159.2.

Intervenor Legion Insurance Company, ("Legion") provided insurance coverage for defendants in the period covered by the allegations of this case. Legion filed a declaratory relief action in which the Holleys and Bauer intervened. The Court granted Legion's summary judgment motion and declared that the alleged acts by defendants were not covered by the insurance and Legion's liability was limited to a $10,000 duty to defend. Defendant Meyer then filed this motion to dismiss.

II. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1887) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). On a motion to dismiss, the court must presume all factual allegations of the pleading to be true and draw all reasonable inferences in favor of the nonmoving party. *Id.*

III. DISCUSSION

Meyer moves to dismiss on two individual grounds. First, he claims that as a designated broker who had no part in the discriminatory acts, he cannot be found personally liable. Second, because the complaint was filed in October 1998, Meyer alleges that the statute of limitations bars many of the claims against him.

A. MEYER'S PERSONAL LIABILITY

1. State Claims

Plaintiffs' state that they have not sued Meyer in his individual capacity for violation of state law, although their complaint does not exactly bear this out.[1] Plaintiffs

[1] In their complaint, plaintiffs state that they are suing Meyer in his individual capacity for all claims except for three. Pls' complaint ¶ 6. However, all but two claims are premised on state law violations. In the hearing on February 2, 1999, this Court inquired of plaintiffs' counsel whether Meyer was being sued in his individual capacity for violations of California law. Plaintiffs' counsel at that point reiterated the fact that Meyer was not being sued individually for any California law

(Continued on following page)

admit that under California law Meyer "cannot be held individually liable unless he participated in the subject transaction." Pls' opp. at 6. Because plaintiffs do not allege that Meyer had anything to do with the actions described in the complaint, Meyer, as a broker, is not individually liable for any state law violations.

California law is very clear that "[a]ny action by the qualifying broker [of a real estate brokerage firm] must be regarded as an action by the corporation and not by the broker as an individual." *Walters v. Marler*, 83 Cal.App.3d 1, 35 (1978). Furthermore, a qualifying broker "may not be held personally liable" for an action of an employee. *See id.*

Plaintiffs call into question the ruling in *Walters* because a year after that court issued its opinion, the California Legislature passed a statute that requires a designated broker to "supervise and control the activities of the sales persons employed by the corporation." Cal. Bus. & Prof. Code § 10159.2. This statute is part of the statutory regulation of real estate brokers that contains sections on licensing requirements and penalties for violations of the regulatory scheme. *See* Cal. Bus. & Prof. Code §§ 10130, 10175-10185. In light of the detailed disciplinary sanctions imposed by §§ 10175-10185, a federal district court ruled that § 10159.2 does not create a private right of action against a designated broker. *See In re Grabau*, 151 B.R. 227, 232 (N.D.Cal. 1993). The court noted that "[t]he most obvious interpretation of § 10159.2 is that it simply extended [the] disciplinary scheme to

violation. Therefore, this court considers the eight claims premised on California law violations to be directed at Meyer in his role as officer of Triad only.

apply against designated brokers who failed to properly supervise employees." *Id.*

As far as the allegations against Meyer in his role as officer of Triad are concerned, these claims should be properly asserted against Triad. Triad is not party to this specific case. Furthermore, any liability against Meyer as an officer of Triad would only attach to Triad in that plaintiffs have not urged theories that could justify reaching Meyer individually. Therefore, all state claims against Meyer as an officer of Triad are dismissed.[2]

2. Federal Claims

Though plaintiffs do not contend that Meyer is individually liable for his alleged state law violations, they do seek to find him liable individually both as an officer and designated broker of Triad for the alleged violations of federal law.

The doctrine of respondeat superior applies to actions brought under 42 U.S.C. § 1982 and FHA. *See City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096 (7th Cir. 1992). Principals have been held liable for the discriminatory actions of their agents in the context of FHA. *See United States v. Ralistrieri*, 981 F.2d 916, 930 (7th Cir. 1992). In most cases where liability is imposed on the principal for the discriminatory acts of an agent, the principal does not need to authorize or know of the discriminatory activity for liability to attach. *See id.*,

[2] Plaintiffs' claims for violation of the Unruh act and for negligence would also be dismissed for being outside the statute of limitations of one year.

981 F.2d at 916. However, the overwhelming majority of these cases takes place in a situation where the principal personally owns the involved real property, as distinguished from the situation where the principal owns a corporation that in turn owns the real property. *See e.g. Walker v. Crigler*, 976 F.2d 900 (4th Cir. 1992); *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975).

As to Meyer's liability for federal violations in his capacity as officer of Triad, these claims should be asserted against Triad which is not party to this specific case. Furthermore, any liability against Meyer as an officer of Triad would only attach to Triad in that plaintiffs have not urged theories that could justify reaching Meyer individually.

Plaintiffs also allege that Meyer is individually liable as a designated broker. Pls' complaint ¶ 6. Although no specific act of discrimination by Meyer is alleged, this factual allegation is not necessary for his individual liability as a designated broker under the federal claims. A licensed broker under whose license employees operate may be liable for the discriminatory actions of those employees. *See Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232, 1303 (N.D. Ohio 1983), *rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985). In *Hilltop* the court deemed that the licensed broker, in that case a corporation, was "liable for the imputed acts and statements" of those agents operating under the license who participated in violations of the federal housing laws. *See id.* The plaintiffs also sought to attach liability to the owner/president of the corporation. *See id.* The court held that since the agents that committed the discriminatory acts had a "contractual relationship with [the corporation]

as broker and not with [the owner/president] as broker, [the agents'] acts and statements [could] not be imputed to [the owner/president.]" *See id.*[3]

Similarly, in *United States v. Lorantffy Care Center*, 999 F.Supp. 1037, 1045 (N.D. Ohio 1998), the U.S. government was seeking to find employees personally liable for the pattern and practice of discrimination allegedly perpetrated by a care center for the elderly. The court noted that there is a right to challenge the "illegal activities of a group of persons even if the individual members" were not engaged in any illegal activity. *See id.* "However, that right is limited. In particular, no individual may be held vicariously liable simply because she is an officer or manager of the company." *Id.* Thus, where the designated broker is a company, the liability attaches to the company and not to the officers of the company who did not engage in discriminatory conduct. *Id.* Therefore, here if plaintiffs establish that a discriminatory act took place by an agent who operated under a broker's license held by Meyer as an individual and not as an officer, they could recover against Meyer individually.

In sum, the Court dismisses Meyer as an officer for ail federal and state claims. The Court also dismisses Meyer

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[3] The court also explained why the owner could not be liable through the piercing of the corporate veil doctrine. "[V]icarious liability may not be imposed on [the owner] because of his other roles at [the corporation] . . . [s]ince he is not the sole owner of the company, his partial stock ownership would not permit a per se piercing of the corporate veil." *Hilltop Realty*, 629 F.Supp. at 1304. The court noted that the owner's status "as president and chief operating officer in and of itself does not render him personally liable for acts of the corporation or its agents or employees" absent a personal participation in the prohibited conduct. *See id.*

as an individual from all claims except Claims One and Two which are premised on his being a designated broker.

With respect to Meyer's liability as an individual for violations of federal law the Court needs to address defendant's statute of limitations claim.

B. STATUTE OF LIMITATIONS ANALYSIS

The alleged episodes of discrimination occurred in November 1996. Plaintiffs state that they discovered the alleged discrimination in April 1997. Plaintiffs initiated the action against Meyer in October 1998. Thus a statute of limitations of one year on any particular claim would preclude plaintiffs from asserting that claim against Meyer. Likewise, any claim with a limitations period of two or more years would mean that plaintiffs were within the time period allowed for the bringing of the action against Meyer.

As to the federal claims, defendant only raises the time-barred defense with respect to 42 U.S.C. § 1982 contending that a one year limitation applies. The limitations period begins to run from the "date of the last act." *See Havens Realty Corporation v. Coleman*, 455 U.S. 363, 380-81 (1982). Accordingly the limitations period began to run in November 1996 (the latest date of the alleged discrimination).

Plaintiffs attempt to skirt the whole limitations period issue by saying that because Meyer's violation continued until August 1998, the date he ceased being Triad's designated broker, plaintiffs are within a one year limit should this be the applicable period. This argument fails. Plaintiffs point to a line of cases which state that the

limitations period only accrues from the date of the last act in cases involving a "pattern" of discrimination. *See Coleman*, 455 U.S. at 380-81.

Plaintiffs attempt to analogize *Coleman* with the facts of this case. However, in *Coleman* there were specific allegations of different instances of discriminatory episodes. *See Coleman*, 455 U.S. at 366. Here, there are no such allegations leveled at Meyer. Plaintiffs' statement that "Meyer continues to engage in grossly negligent conduct by abdicating all responsibility for Triad Realtors" does not rise to the level of a pattern of discrimination. Plaintiffs point to no other allegations of discriminatory conduct by Meyer's subordinates and a mere omission to supervise one employee at one time is not akin to specific episodes of active discrimination. Thus the statute of limitations accrued in November 1996 for the federal claims.

Defendant states that the limitations period for violation of 42 U.S.C. § 1982 is one year. Defendant reaches this conclusion by analogizing a § 1982 claim to a § 1983 claim. The Supreme Court has ruled that § 1983 claims are governed by the most applicable state statute of limitations period. *See Wilson v. Garcia*, 471 U.S. 261 (1985). Defendant contends that the closest applicable state limitations statute is the California personal injury statute (California Code of Civil Procedure § 340) of one year and therefore this should apply. Plaintiffs' only argument with respect to this claim rests with the "continuing violation" period outlined and rejected above.

One court has held that a one year statute of limitations applies to actions filed under 42 U.S.C. § 1982. *See Mitchell v. Sung*, 816 F.Supp. 597 (N.D.Cal. 1993). In that

case, the court determined that § 1982 is akin to §§ 1981 and 1983 because all of this statutory section was part of the same package of rights. *See Mitchell*, 816 F.Supp at 601. Thus, because the Supreme Court had already indicated that §§ 1981 and 1983 were to be governed by state limitations periods for personal injury suits and that relevant period in California is one year, § 1982 claims also carry the same limitations period. *Id.* This Court agrees.

Because the limitations period against Meyer has already expired the Court GRANTS defendant's motion to dismiss Meyer as an individual with respect to the § 1982 claim.

IV. CONCLUSION

For the foregoing reasons the Court: (1) GRANTS defendant's motion to dismiss Claims Two through Ten in their entirety; (2) GRANTS defendant's motion to dismiss Meyer as an officer of Triad in Claim One; and (3) DENIES defendant's motion to dismiss Meyer as a designated broker in Claim One.

Date: March 15, 1999

/s/ Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne Jr.
United States District Judge

JAMES W. PEEL, No. 123403
BROWN & PEEL
3585 West Beechwood, Suite 101
Fresno, California 93711

Telephone: (559) 431-1300
Telecopier: (559) 431-1442

Attorneys for: Defendant DAVID MEYER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public,	) Case No. 98-7965 CM (Mcx))) DECLARATION OF JAMES W. PEEL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Plaintiffs,	)
v.	)
DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD INC., doing business as TRIAD REALTORS,	)
Defendant.	)

I, James W. Peel, declare:

1. That I am an attorney at law, duly licensed to practice before all the courts in the State of California, and

am a member of the law firm of Brown & Peel, attorneys of record herein for defendant David Meyer.

2. That attached hereto and incorporated herein as Exhibit "A" is a true and correct copy of relevant portions from the deposition of defendant David Meyer taken on February 10, 1999. The excerpts accurately reflect the questions asked of, and the answers given, by Mr. Meyer.

3. That attached hereto and incorporated herein as Exhibit "B" is a true and correct copy of portions of Triad Inc's file subpoenaed by plaintiffs' counsel from the Department of Real Estate. Pursuant to *Federal Rule of Evidence*, Rule 201, and *Mack v. South Bay Beer Distributors Inc.* (1986) 798 F.2d 1279, 1282, I respectfully request that the court take judicial notice of the State record.

4. That attached hereto and incorporated herein as Exhibit "C" is a true and correct copy of Triad Inc's license certificate, identification number 00490616 with an issuance date of August 16, 1994 and an expiration date of August 15, 1998. Pursuant to *Federal Rule of Evidence* Rule 201, and *Mack v. South Bay Beer Distributors Inc.* (1986) 798 F.2d 1279, 1282, I respectfully request that the court take judicial notice of the State record.

5. That attached hereto and incorporated herein as Exhibit "D" are true and correct copies of portions of Grove Crank's records subpoenaed from the Department of Real Estate by plaintiffs' counsel. Pursuant to *Federal Rule of Evidence* Rule 201, and *Mack v. South Bay Beer Distributors Inc.* (1986) 798 F.2d 1279, 1282, I respectfully request that the court take judicial notice of the State record.

6. That attached hereto and incorporated herein as Exhibit "E" is a true and correct copy of Grove Crank's

License Certificate. Pursuant to *Federal Rule of Evidence* Rule 201, and *Mack v. South Bay Beer Distributors Inc.* (1986) 798 F.2d 1279, 1282, I respectfully request that the court take judicial notice of the State record.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own personal knowledge, with the exception of those matters based upon information and belief, and as to matters I am informed and believe they are true and correct.

Executed this 31st day of March, 1999, at Fresno, County of Fresno, California.

By: /s/ James W. Peel
JAMES W. PEEL
Attorney for Defendant
DAVID MEYER

[Exhibits A, B, C, D, and E are reproduced in Joint Appendix Lodging pages JA L1 to JA L12.]

JAMES W. PEEL, No. 123403
BROWN & PEEL
3585 West Beechwood, Suite 101
Fresno, California 93711

Telephone: (559) 431-1300
Telecopier: (559) 431-1442

Attorneys for: Defendant DAVID MEYER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public,	) Case No. 98-7965 CM (Mcx)))) DECLARATION OF) GROVE S. CRANK IN) SUPPORT OF MOTION) FOR SUMMARY) JUDGMENT
Plaintiffs,	)
v.	)
DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD INC., doing business as TRIAD REALTORS,	)
Defendant.	)

I, Grove S. Crank, declare:

1. That I am a resident of Twenty-Nine Palms, California, and a licensed real estate agent since approximately 1980.

2. That attached hereto and incorporated herein as Exhibit "D" to the decision of James W. Peel is a true and correct copy of my real estate agent's renewal application, identification number 00796957, with the effective dates from April 8, 1994 through April 7, 1998.

3. That attached as Exhibit "E" to the declaration of James W. Peel is a true and correct copy of my license certificate from the Department of Real Estate, identification number 00796957, with the effective dates from April 8, 1994 through April 7, 1998.

4. From April 8, 1994, through April 7, 1998, Triad Inc., has exclusively been my employing broker. I am an officer of Triad Inc., and have been such since September of 1996. During that time period, none of the agents in my office have operated under a personal broker's license held by David Meyer. I am informed and believe that Mr. Meyer has not held a personal broker's license for the past ten years, and that each of the agents in my office were acting under the Triad Inc. corporate license identified as Exhibit "C" to the declaration of James W. Peel during the time period of August 16, 1994 through August 15, 1998.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own personal knowledge, with the exception of those matters based upon information and believe, and as to matters I am informed and believe they are true and correct.

Executed this 31 day of March, 1999, at Fresno, County of Fresno, California.

By: /s/ Grove S. Crank
GROVE S. CRANK

[Proof of Service Omitted In Printing]

BRANCART & BRANCART
Christopher Brancart (SBN 128475)
Elizabeth Brancart (122092)
Post Office Box 686
Pescadero, California 94060
Tel: (650) 879-0141
Fax: (650) 879-1103

THE LAW OFFICE OF GREG ALEXANIAN
Greg Alexanian (SBN 183161)
10061 Riverside Drive, Suite 723
Toluca Lake, California 91602
Tel: (818) 760-3386
Fax: (818) 752-8221

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY et al.,	) **Case No. CV 97-8368 WMB (SHx)**
Plaintiffs,	) **Consolidated with**
vs.	)
GROVE S. CRANK, SR., TRIAD INC., each individually and doing business as TRIAD REALTORS,	)
Defendants.	)

EMMA MARY ELLEN HOLLEY et al.,	) **Case No. 98-7965 WMB (SHx)**
Plaintiffs,	) **DECLARATION OF ELIZABETH BRANCART IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; EXHIBITS**
vs.	)
DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD INC., doing business as TRIAD REALTORS,	) **Hearing:**) **Date: TBA**) **Time: TBA**) **Room: WMB**
Defendant.	)

I, Elizabeth N. Brancart, do hereby declare:

1. I am an attorney licensed to practice in California and admitted to practice in this district and one of the attorneys for the plaintiffs in this action. I have personal knowledge of the matters set forth herein, and if called to testify, could and would testify to them. This declaration is submitted in support of plaintiffs' statement of genuine issues of material fact in opposition to defendant's motion for summary judgment.

2. Exhibit 1 is a true and correct copy of the entire file for defendant Triad, Inc., produced by the Custodian of Records, Licensing Department, Department of Real Estate, to plaintiffs pursuant to a subpena, served upon the Department of Real Estate on October 27, 1998. Exhibit 1 is comprised of a copy of the subpena and document numbers 15343 through 15387 produced pursuant to that subpena.

3. Exhibit 2 is a true and correct copy of the entire file for defendant Grove Steven Crank, produced by the Custodian of Records, Licensing Department, Department of Real Estate, to plaintiffs pursuant to a subpena, served upon the Department of Real Estate on October 27, 1998. Exhibit 2 is comprised of a copy of the subpena and document numbers 15388 through 15404 produced pursuant to that subpoena.

4. Exhibit 2 is a true and correct copy of the entire file for defendant David Eugene Meyer, produced by the Custodian of Records, Licensing Department, Department of Real Estate, to plaintiffs pursuant to a subpena, served upon the Department of Real Estate on October 27, 1998. Exhibit 3 is comprised of a copy of the subpena and document numbers 15405 through 15443 produced pursuant to that subpena.

5. Exhibit 4 is a true and correct copy of the declaration of custodian of business records for the Department of Real Estate that was produced with the files identified herein under Exhibit numbers 1 through 3.

6. Exhibit 5 is a true and correct copy of excerpts of the deposition of defendant David Meyer, conducted by plaintiffs on February 10, 1999. A certified copy of the entire transcript of the deposition of Mr. Meyer is being lodged concurrently herewith in accordance with Central District Local Rule 8.1.2.

7. Exhibit 6 is a true and correct copy of the Declaration of David Meyer in Support of Opposition to Plaintiffs' Motion to Amend, filed May 18, 1998.

8. Exhibit 7 is a true and correct copy of document bates stamped 2000, the minutes of the board of directors of Triad dated April 18, 1995, as provided to plaintiffs by

defendants in this case. Document 2000 is the only document provided to plaintiffs by defendants that reflects any change in the corporate structure of Triad in 1995. Document 2000 makes no mention of any transfer of ownership between Mr. Meyer and Mr. Crank.

I swear that the foregoing is true and correct under penalty of perjury.

Executed on April 16, 1999, at Pescadero, California.

/s/ Elizabeth Brancart
Elizabeth Brancart

[Exhibits 1, 2, 3, 4, 5, 6, and 7 are reproduced in Joint Appendix Lodging at pages JA L13 to JA L154.]

BRANCART & BRANCART
Christopher Brancart (SBN 128475)
Elizabeth Brancart (SBN 122092)
Post Office Box 686
Pescadero, California 94060
Tel: (650) 879-0141
Fax: (650) 879-1103

THE LAW OFFICE OF GREG ALEXANIAN
Greg Alexanian (SBN 183161)
10154 Riverside Drive
Toluca Lake, CA 91602
Tel: (818) 760-3386
Fax: (818) 752-8221

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public,	**Case No. CV 97-8368 WMB (SHx) Consolidated with**
Plaintiffs,	
vs.	
GROVE S. CRANK, SR. and TRIAD INC., each individually and doing business as TRIAD REALTORS,	
Defendants.	

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public,	**Case No. CV 98-7965 WMB (SHx)**
Plaintiffs,	**NOTICE OF LODGING CERTIFIED COPY OF DEPOSITION OF DEFENDANT DAVID E. MEYER IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
vs.	
DAVID MEYER, individually in his capacity as President and designated officer/broker of TRIAD INC., doing business as TRIAD REALTORS,	**Hearing: Date: TBA Time: TBA Room: WMB**
Defendant.	**(Filed April 19, 1999)**

Please take notice that plaintiffs have lodged the certified copy of the transcript of the deposition of defendant David Eugene Meyer in this action with the Clerk of the District Court in opposition to defendant's motion for summary judgment

Dated: April 16, 1999.

Respectfully submitted,

BRANCART & BRANCART

/s/ Elizabeth Brancart
Elizabeth Brancart
Attorneys for Plaintiffs

[Proof Of Service Omitted In Printing]

[Excerpts of Deposition are reproduced in Joint Appendix Lodging at pages JA L155 to JA L160.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, et. al., Plaintiffs, v. DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD INC., dba TRIAD REALTORS, Defendant.	CV 98-7965-WMB ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed July 26, 1999)

I. BACKGROUND

Emma Mary Ellen Holley, David Holley, Michael Holley ("Holleys") and Brooks Bauer ("Bauer") (collectively "plaintiffs") filed a complaint on November 14, 1997, alleging that Grove Crank Sr. ("Crank") and Triad, Inc, (a California real estate corporation) violated federal and state fair housing laws by discriminating against plaintiffs on the basis of their race during an attempt by the Holleys to purchase a house. Plaintiffs also sued David Meyer ("Meyer") in a separate action that covered the same allegations and added several new claims. The two cases have been consolidated.

Plaintiffs allege that in October 1996, the Holleys visited the Twenty-Nine Palms office of Triad, Inc. There, they met with Triad, Inc. agent Crank and inquired about listings for new houses in the $100,000 to $150,000 range. Crank took the Holleys to see four houses in the area, all

of which were above $150,000. In mid-November 1996, the Holleys located a home on their own that happened to be listed with Triad, Inc. When the Holleys asked about that house, Ms. Terry Stump ("Stump") a Triad, Inc. agent, informed them that the asking price for the house was $145,000.

The Holleys wished to make an offer to purchase that house at the listed price, but they wanted to wait until they closed escrow on their existing home. The Holleys indicated to Stump that they would put $5000 in escrow for the seller to hold the house until April or May 1997. Stump told the Holleys that their offer seemed fair. Mrs. Holley called Bauer, the seller of the house, to tell him that they would offer to pay the listed price for the house, and pay $5000 to hold the house until their escrow closed. Bauer indicated that he thought it seemed fair, but told the Holleys that the offer must go through Triad, Inc.

Later, Stump called Mr. Holley to tell her [sic] that other people in the Triad, Inc. office felt that $5000 was not enough money to get the seller to hold the house for six months. The Holleys decided not to raise their offer, and Stump said that the offer would not be presented to Bauer. Stump indicated that Crank and Lois Carroll were the agents in the office who determined that the offer was too low, and that as a newer agent, she had to follow their instructions. The Holleys told Stump that Bauer should be able to decide if the offer was fair.

One week later, Bauer stopped by the Triad, Inc. office to find out the status of the Holleys' offer. Crank then allegedly used racial statements in referring to the Holleys and called them a "salt and pepper team." Mrs. Holley is African American while her husband is white. Bauer and

the Holleys filed a complaint against Triad, Inc. with the San Bernardino Fair Housing Council.

In November 1997, Plaintiffs filed this action alleging six claims against defendants: (1) violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3604; (2) violation of 42 U.S.C. § 1982; (3) violation of the California Fair Employment and Housing Act, Cal. Gov. Code § 12955; (4) violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51; (5) unfair business practices in violation of Cal. Bus. & Prof. Code § 17200; and (6) negligence. In October 1998, the plaintiffs then filed the case against Meyer alleging the earlier claims and adding four additional claims: (1) breach of fiduciary duty to plaintiff Bauer; (2) tortious interference with economic relationship; (3) negligent interference with economic relationship; and (4) violation of the California statutory negligence provisions, Cal. Bus. & Prof. Code §§ 10177(h) & 10159.2.

Intervenor Legion Insurance Company, ("Legion") provided insurance coverage for Triad, Inc. in the period covered by the allegations of this case. Legion filed a declaratory relief action in which the Holleys and Bauer intervened. The Court granted Legion's summary judgment motion and declared that the acts by plaintiffs were not covered by the insurance and Legion's liability was limited to a $10,000 duty to defend.

Defendant Meyer then filed a motion to dismiss. On March 17, 1999, this Court granted Meyer's motion for all eight state claims and for plaintiffs' federal claim based on the violation of 42 U.S.C. § 1982. This Court denied Meyer's motion with respect to the federal claim based on the violation of FHA on the grounds that "if plaintiffs establish that a discriminatory act took place by an agent

who operated under a broker's license held by Meyer as an individual and not as an officer, they could recover against Meyer individually." *See* Order Granting in Part and Denying in Part, Def's Motion to Dismiss, at 9. Meyer now moves for summary judgment on the one remaining federal claim.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

The moving party for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of fact for trial. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). When the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact would find other than for the moving party. On an issue for which the nonmoving party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party satisfies its initial burden, the nonmoving party must go beyond the pleadings and, by its

own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed R. Civ. Proc. 56(e). If the nonmoving party fails to make this showing, "the moving party is entitled to judgment as a matter of law." *Celotex Corp.*, 477 U.S. at 323.

III. DISCUSSION

A licensed broker under whose license employees operate may be liable for the discriminatory actions of those employees. *See Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232, 1303 (N.D. Ohio 1983), *rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985). In *Hilltop* the court deemed that the licensed broker, in that case a corporation, was "liable for the imputed acts and statements" of those agents operating under the corporation's license who participated in violations of the federal housing laws. *See id.* The plaintiffs also sought to attach liability to the owner/president of the corporation. *See id.* The court held that since the agents that committed the discriminatory acts had a "contractual relationship with [the corporation] as broker and not with [the owner/president] as broker, [the agents'] acts and statements [could] not be imputed to [the owner/president.]" *See id.*[1]

[1] The court also explained why the owner could not be liable through the piercing of the corporate veil doctrine. "[V]icarious liability may not be imposed on [the owner] because of his other roles at [the corporation] . . . [s]ince he is not the sole owner of the company, his partial stock ownership would not permit a per se piercing of the corporate veil." *Hilltop Realty*, 629 F.Supp. at 1304. The court noted that the owner's status "as president and chief operating officer in and

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Similarly, in *United States v. Lorantffy Care Center*, 999 F.Supp. 1037, 1045 (N.D. Ohio 1998), the government was seeking to hold employees personally liable for the pattern and practice of discrimination allegedly perpetrated by a care center for the elderly. The court noted that there is a right to challenge the "illegal activities of a group of persons even if the individual members" were not engaged in any illegal activity. *See id.* "However, that right is limited. In particular, no individual may be held vicariously liable simply because she is an officer or manager of the company." *Id.*

Thus, where the license is held by a corporation, the liability attaches to the corporation and not to the officers of the corporation who did not engage in discriminatory conduct. Therefore, the sole issue in this summary judgment motion is whether Meyer, holds his broker's license as an individual or as an officer of Triad, Inc.

In opposing defendant's motion for summary judgment, plaintiffs seem to pay little attention to the Court's framing of the issue concerning the status of Meyer's license. Rather, plaintiff's focus on attempting to argue that the Court misread the law regarding personal liability of principals for the unlawful acts of their agents under FHA.[2] Plaintiffs' arguments have already been addressed

of itself does not render him personally liable for acts of the corporation or its agents or employees" absent a personal participation in the prohibited conduct. *See id.*

[2] In his reply brief, defendant correctly points out that instead of addressing the issue pertinent to this summary judgment motion, plaintiffs have framed their arguments in a way that looks like a motion for reconsideration of the Court's order denying in part and granting in part Meyer's motion to dismiss. *See* Def's Reply at 2. Under Central District of California Local Rule 7.16, a motion for reconsideration is

(Continued on following page)

and rejected in this Court's previous order and need not be repeated here.

In California, both corporations and individuals have to be licensed to operate as real estate brokers. *See* Cal. Bus. & Prof. Code § 10006. If the licensee is a corporation, the license entitles one officer from the corporation to act as a real estate broker for the corporation and he must be designated as such on the license. *See* Cal. Bus. & Prof. Code § 10211. "Each officer of a corporation through whom it is licensed to act as a real estate broker is, while so employed under such license, a licensed real estate broker, but licensed only to act as such for and on behalf of the corporation as an officer." *See* Cal. Bus. & Prof. Code § 10159.

During the time relevant to this case, the real estate license was issued to Triad, Inc. with Meyer as the designated corporate officer of Triad, Inc. Crank was employed by and licensed as a salesperson for Triad, Inc. Therefore,

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only proper in the following circumstances: (1) if there is a material difference in fact or law from that presented to the Court before such decision that, in the exercise of reasonable diligence, could not have been known to the party moving for reconsideration at the time of such decision; or (2) if new material facts emerge or a change of law occurs after the time of such decision; or (3) if there is a manifest showing of a failure to consider material facts presented to the Court before such a decision. A motion for reconsideration shall not in any manner repeat any arguments that were presented in the original motion or opposition. *See Guthy-Renker Fitness, L.L.C. v. Icon Health & Fitness, Inc.*, 179 F.R.D. 264, 275 (C.D.Cal. 1998). A motion for reconsideration cannot be based on evidence that could reasonably have been discovered prior to the court's ruling. *See Hopkins v. Andaya*, 958 F.2d 881, 887 n.5 (9th Cir. 1992). As discussed in the main portion of the text, plaintiffs have presented no scenario under which this Court should reconsider its ruling in Meyer's motion to dismiss.

because Triad, Inc. was the licensed broker, Crank's contractual relationship was with Triad, Inc. and not with Meyer. *See Hilltop*, 629 F.Supp. at 1303. Thus, Crank's discriminatory acts are imputed to Triad, Inc. and not to Meyer as an individual. Hence Meyer cannot be held personally liable for Crank's alleged misconduct.

IV. CONCLUSION

For the foregoing reasons, defendant Meyer's motion for summary judgment is GRANTED.

DATE: July 26, 1999

/s/ Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, et. al., Plaintiffs, v. DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD, INC., dba TRIAD REALTORS, Defendant.	CV 98-7965-WMB JUDGMENT (Filed Jul. 26, 1999)

The Court having issued its Order in the above entitled action, IT IS HEREBY ORDERED that judgment be granted for David Meyer on all remaining claims in this action.

Each side to bear its own costs.

Date: July 26, 1999

/s/ Wm. Matthew Byrne
Wm. Matthew Byrne, Jr.
United States District Judge

United States Court of Appeals,
Ninth Circuit.

Emma Mary Ellen HOLLEY; David Holley; Michael Holley, a minor; Brooks Bauer, individually and on behalf of the general public, Plaintiffs-Appellants,

v.

Grove S. CRANK, Sr., individually, dba Triad Realtors; Triad Inc., individually, dba Triad Realtors Defendants,

and

David Meyer, individually and in his capacity as President and designated officer/broker of Triad, Inc., dba Triad Realtors, Defendant-Appellee.

No. 99-56611.

Argued and Submitted March 5, 2001
Filed July 31, 2001

Elizabeth N. Brancart, Brancart & Brancart, Pescadero, California, for the appellants.

Douglas G. Benedon, Benedon & Serlin, Woodland Hills, California, for the appellee.

Appeal from the United States District Court for the Central District of California; William Matthew Byrne, Jr., Senior District Judge, Presiding. D.C. Nos. CV-98-07965-WMB-HX, CV-97-08369-WMB-SHX.

Before: HUG, AND B. FLETCHER, CIRCUIT JUDGES, and ILLSTON, District Judge.*

* Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

HUG, Circuit Judge:

In this case we must decide whether owners and officers of corporations may be held vicariously liable for an employee's violations of the Fair Housing Act (FHA). We conclude that they can. Although under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the Fair Housing Act is different as liability is specified for those who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling. The decision of the district court is reversed.

BACKGROUND

Emma Mary Ellen Holley is African American, her husband David Holley, is Caucasian and their son, Michael Holley is African American. The Holleys allege that in October 1996, they visited Triad Realty's office in Twenty-Nine Palms, California where they met with Triad agent Grove Crank and inquired about listings for new houses in the range of $100,000 to $150,000. The Holleys allege that Crank showed them four houses in the area, all above $150,000. In mid-November 1996, the Holleys located a home on their own that happened to be listed by Triad. In response to the Holleys' inquiry about the home, Triad agent Terry Stump informed them that the asking price for the house was $145,000. The Holleys expressed interest in purchasing the home and offered to pay the asking price and to put $5,000 in escrow for the builder to hold the house until April or May 1997 when they closed escrow on their existing home.

Stump told the Holleys that their offer seemed fair, as did the builder, Brooks Bauer, when Mrs. Holley called him with the same offer. Bauer did express, however, that the offer would have to go through Triad. Later, Stump called Mrs. Holley to tell her that more experienced agents in the office, one of whom was later identified as Grove Crank, felt that $5,000 was insufficient to get the builder to hold the house for six months. The Holleys decided not to raise their offer and Triad never presented the original offer to Bauer. One week later, Bauer inquired at Triad about the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys, telling Bauer that he did not want to deal with those "n" and called them a "salt and pepper team." The Holleys eventually hired a builder to construct a house for them and Bauer later sold his house for approximately $20,000 less than the Holleys had offered.

Bauer and the Holleys filed a complaint on November 14, 1997, alleging that Crank and Triad violated federal and state fair housing laws. They later filed a separate action against David Meyer as officer/broker, president and owner of Triad, covering the same allegations and adding several new claims. The district court consolidated the two cases. The district judge, ruling on a Federal Rule of Civil Procedure 12(b)(6) motion, dismissed all of the claims except the FHA claim, on the grounds that they were barred by the applicable statutes of limitation. Plaintiffs have not appealed this ruling. With regard to the FHA claim, the district court granted the motion to dismiss Meyer in his capacity as an officer of Triad stating that any liability of Meyer as an officer of Triad would attach to Triad in that Plaintiffs have not urged theories that would justify reaching Meyer individually. Meyer

than [sic] moved for summary judgment on the remaining FHA claim. The district court granted Meyer summary judgment on that claim, finding that, during the relevant time, the real estate license was issued to Triad, with Meyer as the designated corporate officer of Triad. Thus, the district court concluded that Crank's discriminatory acts could be imputed to Triad, but not to Meyer as an individual. The district court entered a Rule 54(b) certification of that judgment as final to allow this appeal, and stayed all remaining proceedings against Triad and Crank.

ANALYSIS

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act of 1968 (FHA), broadly prohibits discrimination in housing. 42 U.S.C. § 3601 *et seq*. An examination of the Act reveals a "broad legislative plan to eliminate all traces of discrimination within the housing field." *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir.1974). The FHA itself, however, does not limit or define who can be sued for discriminatory housing practices. The Department of Housing and Urban Development (HUD), the federal agency primarily assigned to implement and administer Title VIII, has developed regulations and guidelines, which this Court affords considerable deference, interpreting when liability attaches under the FHA. *See Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir.1999). Historically, HUD's regulations for administrative complaints have provided, in relevant part:

> A complaint may also be filed against any person who directs or controls, *or has the right to direct or control, the conduct of another person* with respect to any aspect of the sale . . . of dwellings or the provision of brokerage services relating to the sale [ ] of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

24 C.F.R. § 103.20 (1999)[1] (emphasis added).

The FHA provides two means of enforcing its provisions. Under § 3610(a), a person "aggrieved" may file a complaint with HUD, and the agency investigates and resolves the complaint's charges. If the administrative agency is unable to obtain compliance or concludes that judicial action is necessary to carry out the purposes of the Act, a civil suit may be commenced. 42 U.S.C. §§ 3610(e) & (g); 3612. The alternate route for obtaining redress under the FHA is pursuant to § 3613, which provides the right to file suit in a federal or state court without awaiting action by HUD. Thus, the two sections provide parallel remedies for the same prospective plaintiffs and courts have analyzed the provisions as alternate analogous remedies. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 105-8, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (noting HUD's consistent treatment of the two provisions as alternative remedies to precisely the same prospective plaintiffs); *see also Marr v. Rife*, 503 F.2d at 739 (concluding that

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[1] The current version of this regulation replaces this language with an apparently more user-friendly provision instructing that a person should notify HUD for assistance in filing a claim if they believe there has been discrimination against them in any activity related to housing because of race, color, religion, national origin, sex, disability, or the presence of children under the age of 18 in a household. 24 C.F.R. § 103.10-20. Absent any indication that HUD intended to narrow liability under the new regulations, we find the previous language instructive regarding the potential scope of liability.

although the civil action provision fails to indicate the burden of proof to be applied, it would be anomalous for a different burden to apply under that section than is applied under § 3610). Accordingly, we look to HUD's relevant regulatory history for administrative complaints to help determine the scope of liability here.

The district court found that as a matter of law Meyer could not be vicariously liable based on his position as president and officer/broker of Triad. We disagree. Considering the relevant HUD regulation quoted above, Meyer bears potential liability in his capacity as owner, president and officer/broker of the corporation. Additionally, our Court has recognized that the duty to obey the laws relating to racial discrimination under the FHA is non-delegable. *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir.1980). Although officers and shareholders of a corporation generally enjoy immunity from liability for corporate acts, as a matter of furthering the compelling policy of the FHA and because this involves a non delegable duty, we conclude that a corporation and its officers may be held liable for their failure to ensure the corporation's compliance with the FHA, whether or not the officers directed or authorized the particular discriminatory acts that occurred.[2] While we recognize that holding a corporation and its officers responsible even though the acts of subordinate employees were neither directed nor authorized seems harsh punishment of an otherwise innocent employer, we agree with our sister Circuits in finding that preferable to leaving the burden on the

[2] Our decision applies only to vicarious liability for compensatory damages. We do not address vicarious liability for punitive damages as the issue is not before us.

innocent victim who felt the direct harm of the discrimination. *See City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096-97 (7th Cir.1992); *Walker v. Crigler*, 976 F.2d 900, 904-905 (4th Cir.1992). The overriding societal priority of the FHA indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and to ensure that similar harm will not occur again. When one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden. *See Walker*, 976 F.2d at 904.

Meyer's Liability as Sole Owner and Officer of Triad

The district court did not expressly address Meyer's liability as sole owner of Triad and Meyer maintains that Appellants did not sue Meyer as Triad's owner. The complaint against Meyer sued him for FHA violations in his individual capacity *and* as an officer and designated officer/broker of Triad. It does not appear that Meyer could be liable as an individual, as opposed to in his capacity as officer/broker and president of Triad, other than under a theory of vicarious liability as the owner of Triad, as there is no allegation that he directly participated in the discrimination. Accordingly, we address his potential liability as sole owner of Triad for FHA violations of employees.

The duty to obey the laws relating to racial discrimination under the FHA is non-delegable. *Phiffer*, 648 F.2d at 552. In *Phiffer*, this court concluded that the owner of the Proud Parrot Motor Hotel Corporation was liable for the discriminatory conduct of his desk clerk even absent

any evidence that the clerk acted under management's instruction. *Id.*[3] Although *Phiffer* involved an owner of a motel rather than a real estate corporation, the same rule is compelling here. Triad was directly and immediately involved in the sale of real estate involving the alleged violation. As the real estate agency that allegedly committed the unlawfully discriminatory acts in providing brokerage services for the sale of the property, Triad is connected to the discrimination even more directly than the hotel corporation owner in *Phiffer*. Our rule under *Phiffer* renders the sole owner of a corporation liable based on the non-delegable duty to obey the FHA and, thus, if Meyer owned Triad at the time of the discriminatory acts at issue, he cannot relinquish the responsibility for preventing such discrimination to another party. *Accord Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir.1992).

In so ruling, we follow the lead of other federal circuit courts. The Seventh Circuit held a realty corporation and its sole shareholder vicariously liable for compensatory damages resulting from individual sales agents' FHA violations even though the sole shareholder had specifically instructed the agents not to discriminate and had not personally joined in any discriminatory acts. *Matchmaker*, 982 F.2d at 1096-98. Noting *Walker*'s policy discussion, the Seventh Circuit agreed with the Fourth Circuit that "'we must hold those who benefit from the sale and rental of property to the public to the specific mandates of anti-discrimination law if the goal of equal housing opportunity

[3] The court did note that the magistrate had found that the desk clerk's actions reflected established policy of the Proud Parrot. Still, the court's language regarding the non-delegable duty to follow the law is clear and instructive.

is to be reached.'" *Id.* at 1096 (quoting *Walker*, 976 F.2d at 905). We also agree with this policy.

Matchmaker concluded that as the sole owner of the corporation, the chief executive officer and the supervisor of the day-to-day operations of the corporation and its agents, the defendant should be personally liable for compensatory damages. *Id.* at 1098. We adopt this reasoning and, thus, remand to the district court to allow the Holleys the opportunity to try the issue of Meyer's ownership of Triad at the time of the alleged violations.[4] We

[4] Meyer started Triad in 1974 and was the sole stockholder from 1978 until around February 1995 when he claims he transferred ownership to Crank. Meyer concedes, however, that there is no documentation reflecting this transfer and that he remained the president and designated officer/broker of the company until 1998. When asked about the circumstances of the transfer of ownership, Meyer described having conversations with Crank in which they decided Crank would carry on with the company, take over financial responsibility and day-to-day operations. The only "evidence" that this transfer of ownership occurred in 1995 is "Document 2000" – the minutes of a meeting in April 1995 making Crank vice-president. Meyer claims that this assignment was associated with the transfer of ownership, despite Meyer remaining president of the company until 1998, and keeping an office there that he used daily until 1997.

The Holleys presented sufficient evidence to entitle them to a trial regarding Meyer's liability as owner of Triad at the time of the alleged discrimination. Appellants also allege that Triad pays its taxes under Meyer's identification number. Furthermore, Meyer executed Crank's renewal of salesperson's license in March 1998 indicating Meyer was the employing broker. At the very least under these circumstances, the alleged undocumented transfer of the corporation is questionable as there would seem to be legal, financial and tax consequences to such a transfer yet there is no explanation or documentation as to how anything was carried out. As such, the issue is one of credibility and fact. Accordingly, we remand to the district court to determine whether Meyer owned Triad during the time at issue and is therefore liable for the agent's discriminatory acts.

agree with the Seventh Circuit that a principal cannot free itself of liability by delegating to an agent the duty not to discriminate. *See id.* at 1096.[5]

While the evidence does not indicate that Crank acted with the approval or at the direction of Meyer, such a finding is not necessary to hold Meyer liable as the sole owner of Triad for breach of a non-delegable duty to comply with the FHA. *See Marr v. Rife*, 503 F.2d at 742. If Meyer solely owned the agency, he had at least the authority to control the acts of his salespersons, particularly in light of his position as president and officer/broker of Triad. As discussed above, this is enough, under the approach we adopt here and that adopted by a number of courts, to hold Meyer personally liable. *Id.*; *Matchmaker*, 982 F.2d 1086; *Walker*, 976 F.2d 900; *Northside Realty Assoc. Inc. v. United States*, 605 F.2d 1348, 1354 (5th Cir.1979); *United States v. Tropic Seas, Inc.*, 887 F.Supp. 1347, 1365 (D.Haw.1995); *United States v. Youritan Constr. Co.*, 370 F.Supp. 643, 649 (N.D.Cal.1973), modified as to relief and aff'd, 509 F.2d 623 (9th Cir.1975).

The same reasoning compels Meyer's potential liability in his capacity as president of the corporation. Perhaps more so than in his capacity as sole owner of the company, as an officer of the company he actually did direct or control, or had the right to direct or control, the conduct of

[5] The Sixth Circuit also held that a real estate agency owner should be vicariously liable for compensatory damages resulting from salespersons' FHA violations even though there was no evidence that the agent acted with the approval or at the direction of the owner. The court reasoned that the owner of the agency had at least the power to control the acts of his salespersons. *Marr v. Rife*, 503 F.2d 735, 742 (6th Cir.1974).

the salespersons who allegedly discriminated against the Holleys with respect to the sale of real estate. While we recognize that corporate officers and shareholders are generally shielded from personal liability, we agree with the Seventh Circuit that "where common ownership and management exists, corporate formalities must not be rigidly adhered to when inquiry is made of civil rights violations." *Matchmaker*, 982 F.2d at 1098. Thus, under relevant HUD regulatory history, and because the duty not to discriminate is a non-delegable one, we join other courts in holding that officers can be individually liable for discriminatory acts of corporate employees under their management and control. *See e.g., Tropic Seas*, 887 F.Supp. at 1365; *Northside*, 605 F.2d at 1354 (holding president and vice-president of real estate corporation accountable for discriminatory acts of their agents, "whether or not the officers directed or authorized the particular discriminatory acts that occurred").

Our decision recognizes the duty under the FHA as non-delegable, furthering the purposes of the FHA. Moreover, as discussed below, Meyer may have neglected his duties to supervise salespeople in their real estate transactions, which included his responsibility to ensure that they follow federal and state anti-discrimination laws.

Meyer's Responsibilities as Designated Officer/Broker of Triad

As designated officer/broker of the company, Meyer was responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees in the performance of acts for which a real estate license is required. Cal. Bus. & Prof.Code § 10159.2(a). Under California law, a real estate

broker is required to exercise reasonable supervision over the activities of his or her salespersons, including familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination. 10 Cal.Code Reg. § 2725(f). His failure to do so also bolsters the contention that he should be held personally liable for unlawful discriminatory acts of Triad's salespersons.

Although federal law governs the issue of agency under the FHA, the California licensing scheme is instructive here in discerning Meyer's supervision and control over Triad sales activity. California law provides that "[n]o acts for which a real estate license is required may be performed for, or in the name of, a corporation" unless the corporation has designated an officer of the corporation to serve as the officer/broker of the company. Cal. Bus. & Prof.Code §§ 10158 & 10211; 10 Cal.Code Reg. § 2740. As a real estate salesperson for Triad, acting under the corporate license, Crank sold real estate under the supervision of the designated officer/broker. Cal. Bus. & Prof.Code § 10159.2(a). Technically, the licensed broker is the corporation, however, as designated broker, under California law, Meyer was personally responsible for this supervision.

The district court interpreted this to mean that Meyer could be personally liable only if Crank operated under a license that Meyer held in his personal capacity rather than as an officer of Triad. Based on the analysis and policy discussed above and the California real estate licensing requirements, we disagree. The designated officer/broker of a real estate corporation in California is responsible for the "supervision and control of the activities conducted on behalf of the corporation by its officers and employees . . . including the supervision of salespersons licensed to the corporation in the performance of acts

for which a real estate license is required." Cal. Bus. & Prof.Code § 10159.2(a).

The state regulations implementing these real estate licensing laws require that a broker exercise "reasonable supervision" over the activities of salespersons. The regulations define such reasonable supervision as including establishment of "policies, rules, procedures and systems to review, oversee, inspect and manage" transactions requiring a real estate license and familiarizing salespersons with the requirements of federal and state laws prohibiting discrimination. 10 Cal.Code Reg. § 2725. Meyer does not dispute that he was the designated officer/broker of Triad at the time of the alleged discrimination. Meyer testified that he understood his responsibilities as designated officer/broker at Triad to include making sure that Triad's agents "were acting lawfully, that contracts were negotiated lawfully" and that people were treated lawfully.

Meyer's undisputed responsibility to supervise Triad's salespersons in real estate transactions places him squarely within HUD's regulatory history allowing complaints against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling. *See* 24 C.F.R. § 103.20 (1999). Meyer argues that this regulation is irrelevant here as it applies to administrative complaints rather than civil actions. The Supreme Court, however, has interpreted the statute authorizing an administrative proceeding and that authorizing the filing of a civil action as providing parallel remedies to the same prospective plaintiffs. *Gladstone*, 441 U.S. at 105-08, 99 S.Ct. 1601. The Court inferred the congressional intent to provide all victims of Title VIII violations two alternative

mechanisms to "seek redress: immediate suit in federal district court or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail." *Id.* at 104, 99 S.Ct. 1601. This judicial interpretation of the two statutes renders the regulation for administrative complaints highly relevant to the instant civil action.

Although the federal courts have declined to allow state law to control rulings on agency for purposes of FHA violations, consideration of the state licensing scheme is appropriate here to determine Meyer's involvement or omissions in the alleged discriminatory acts.[6] As both president and designated officer/broker of Triad, Meyer had a duty to prevent unlawful discrimination such as that which is alleged of Triad salesperson Crank. If Meyer breached that duty to supervise then he should be held accountable for such an omission even absent direct involvement or authorization of Crank's alleged discriminatory conduct.

We disagree with the district court's ruling that Meyer could only be liable here if Crank acted under the authority of a license Meyer held personally rather than as a corporate officer of Triad. His responsibilities as designated officer/broker under Triad's corporate license, by mandate of state law, required him to direct and control

[6] Meyer argues that the California real estate licensing law is irrelevant here as California courts have interpreted it as extending a disciplinary scheme rather than creating a private right of action against a designated broker. Appellants here do not attempt to bring a private action under the California statute, rather they argue that the statute is relevant to determining Meyer's responsibilities of supervision in a claim brought under the FHA.

the conduct of Triad salespersons with respect to the sale of homes and the provision of brokerage services relating to the sale of homes. If Meyer was indeed an officer of the corporation and the designated officer/broker of Triad Realty at the time of the alleged conduct, it is difficult to see how he could be excused from the obligation imposed by the FHA to prohibit discrimination in the housing field.

CONCLUSION

In light of the evidence that Meyer was (1) an officer of Triad Realty at the time of the alleged discriminatory acts; (2) the designated broker of the corporation who enabled it to engage in the business of selling real estate; and (3) the sole shareholder of the corporation at the time of the alleged discrimination, we disagree with the district court's conclusion that as a matter of law Meyer cannot be individually liable for damages resulting from the alleged FHA violations. Accordingly, we reverse and remand this case to the District Court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public, Plaintiffs-Appellants, v. GROVE S. CRANK, SR., individually, dba Triad Realtors; TRIAD INC., individually, dba Triad Realtors Defendants and DAVID MEYER, individually and in his capacity as President and designated officer/broker of Triad, Inc., dba Triad Realtors, Defendant-Appellee.	No. 99-56611 D.C. No. CV-98-07965-WMB-SHX; CV-97-08368-WMB-SHX ORDER (Filed Sept. 19, 2001)

Before: HUG, and B. FLETCHER, Circuit Judges, and ILLSTON, District Judge.*

The panel has voted to deny Appellee's petition for rehearing. Judge Hug has voted to deny the suggestion for

* Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

rehearing en banc, and Judges Fletcher and Illston so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing and suggestion for rehearing en banc are denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public, Plaintiffs-Appellants, v. GROVE S. CRANK, SR., individually, dba Triad Realtors; TRIAD INC., individually, dba Triad Realtors Defendants and DAVID MEYER, individually and in his capacity as President and designated officer/broker of Triad, Inc., dba Triad Realtors, Defendant-Appellee.	No. 99-56611 D.C. No. CV-98-07965-WMB-SHX; CV-97-08368-WMB-SHX ORDER (Filed Oct. 4, 2001)

Before: HUG, Circuit Judge.

Appellee's motion for stay of the issuance of the mandate pending application for writ of certiorari is GRANTED. Fed. R. App. P. 41(d). The mandate is stayed for ninety (90) days from the date this order is filed. If, within that period, the Clerk of the Supreme Court advises the Clerk of this Court that a petition for certiorari has been filed, then the mandate shall be further stayed until final disposition of the matter by the Supreme Court.

Supreme Court, U.S.
FILED
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(10)

No. 01-1120

In The
Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of TRIAD, INC., doing business as TRIAD REALTORS,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

ROBERT G. SCHWEMM
College of Law, Room 209
University of Kentucky
Lexington, Kentucky 40506
(859) 257-6013

BRANCART & BRANCART
ELIZABETH BRANCART
Counsel of Record
CHRISTOPHER BRANCART
Post Office Box 686
Pescadero, California 94060
(650) 879-0141

Attorneys for Respondents Emma Mary Ellen Holley, David Holley, Michael Holley, a minor, and Brooks Bauer

[Additional Counsel Listed On Inside Cover]

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LAW OFFICE OF GREG ALEXANIAN
GREG ALEXANIAN
10154 Riverside Drive
Toluca Lake, California 91602
(818) 760-3386

QUESTIONS PRESENTED

1. Whether petitioner, as the licensed officer/broker of a corporate real estate firm, through whom the corporation is licensed and on whom the license law imposes a personal duty to supervise and control the corporation's licensed activities, is liable for Fair Housing Act violations committed by salespersons acting under the corporation's license.

2. Whether petitioner, as the licensed officer/broker of a corporate real estate firm, may be liable under the Fair Housing Act for his negligent supervision of the corporation's licensed salespersons.

3. Whether petitioner, as the sole shareholder or controlling individual of a corporate real estate firm, may be liable under traditional "veil piercing" principles or the "alter ego" doctrine for his company's Fair Housing Act liability.

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City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086 (7th Cir. 1992), cert. denied, 508 U.S. 972 (1993) 31

City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) 25

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Cosmopolitan Broadcasting Corp. v. Federal Communications Commission, 581 F.2d 917 (D.C. Cir. 1978) 42

Curtis v. Loether, 415 U.S. 189 (1974) 10, 22

Dart Industries, Inc. v. Liberty Mut. Ins. Co., 484 F.2d 1295 (9th Cir. 1973) 45

Edelman v. Lynchburg College, 535 U.S. ___, 122 S. Ct. 1145 (2002) 30

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 11

Fort v. White, 1 EOHC Rptr. (Prentice Hall) ¶ 13,703 (D. Conn. 1975), aff'd, 530 F.2d 1113 (2d Cir. 1976) 28

General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) 11, 43

Gipson v. Davis Realty Co., 215 Cal.App.2d 190, 30 Cal. Rptr. 253 (1963) 15

In re Grabau, 151 B.R. 227 (N.D. Cal. 1993) 21

Grand v. Griesinger, 160 Cal.App.2d 397, 325 P.2d 475 (1958) 14

Heights Community Congress v. Hilltop Realty, Inc., 629 F. Supp. 1232 (N.D. Ohio 1983), aff'd in part and rev'd in part on other grounds, 774 F.2d 135 (6th Cir. 1985), cert. denied, 475 U.S. 1019 (1986) 28

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HUD v. Active Agency, Fair Housing-Fair Lending Rptr. ¶ 25,141 (HUD ALJ 1999) 33, 34

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HUD v. Properties Unlimited, Fair Housing-Fair Lending Rptr. ¶ 25,009 (HUD ALJ 1991) 33

HUD v. Murphy, Fair Housing-Fair Lending Rptr. ¶ 25,002 (HUD ALJ 1990) 33

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Jory v. Bennight, 91 Nev. 763, 542 P.2d 1400 (1975) 17

Kimball Bridge Road at Big Creek v. Everest Realty Corp., 141 Ga.App. 835, 234 S.E.2d 673 (1977) 22

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MBH Commodity Advisors, Inc. v. Commodity Futures Trading Commission, 250 F.3d 1052 (7th Cir. 2001) 42

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Middlesex Insur. Co. v. Mann, 124 Cal.App.3d 558, 177 Cal.Rptr. 495 (1981) 40

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Philadelphia and Reading Railroad Co. v. Derby, 14 How. (55 U.S.) 468 (1852).....11

Railroad Company v. Barron, 5 Wall. (72 U.S.) 90 (1866).....36

Rob-Mac, Inc. v. Department of Motor Vehicles, 148 Cal.App.3d 793, 196 Cal.Rptr. 398 (1983) 42

Sanborn v. Wagner, 354 F. Supp. 291 (D. Md. 1973) 28

Sanders v. Dorris, 873 F.2d 938 (6th Cir. 1989) 31

Smith v. Wade, 461 U.S. 30 (1983) 11

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S. Ct. 992 (2002).....3

Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (4th Cir. 1975).....29

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).....24, 25

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United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826 (1973).....27, 28

United States v. Diebold, Inc., 369 U.S. 654 (1962) 3

United States v. Lorantffy Care Ctr., 999 F. Supp. 1037 (N.D. Ohio 1998).....29

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United States v. Mead Corp., 533 U.S. 218 (2001) 33

United States v. Mitchell, 335 F. Supp. 1004 (N.D. Ga. 1971), aff'd sub nom. *United States v. Bob Lawrence Realty, Inc.,* 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826 (1973).....28

United States v. Northside Realty Assocs., 474 F.2d 1164 (5th Cir. 1973).....28

United States v. Robbins, 1 EOHC (Prentice Hall) ¶ 13,655 (S.D. Fla. 1974).....28

Walters v. Marler, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (1978).....21

Wyatt v. Union Mortgage Co., 24 Cal.3d 773, 598 P.2d 45 (1979).....40

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Fair Housing Act, 42 U.S.C. § 3601 *et seq.*

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California Real Estate Law,
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p. 5644 26

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53 Fed. Reg. (1988)

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p. 24,197 29

54 Fed. Reg. (1989)

p. 3232 31
p. 3260 32
p. 3283 32
p. 3293 31

65 Fed. Reg. (2000)

p. 67,667 32

H.R. Rep. No. 100-711, 100th Cong., 2d Sess. (1988)....29

Ass. Comm. on Labor, Employment, & Consumer Affairs Bill Lockyer, Chairman; Statement on [California] A.B. 985 (1979) 19

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Legislative Proposal, Department of Real Estate Bill Control No. 12-79-113 (2/9/79) 19

Staff Analysis of [California] AB 985 for the Senate Committee on Business & Professions (7/11/79) 19

OTHER AUTHORITIES:

California Department of Real Estate Reference Book (1981)....19

Directory of Brokers and Salesmen, Vol. XXXVII (1956-57)....19

Fletcher Cyclopedia of Law of Private Corporations

Vol. 1 (rev. ed. 1999)....46

Vol. 3A (perm. ed. 1994)....40, 43

Arthur Gaudio, *Real Estate Brokerage Law* (1987) 15

Charles J. Jacobus, *Real Estate Principles* (Prentice-Hall: 8th ed. 1999)....14, 15, 45

Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy,* 36 Harv. C.R.-C.L. L. Rev. 279 (2001) 21

Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law,* 95 Harv. L. Rev. 853 (1982)....46

W. Prosser, *Law of Torts* (4th ed. 1971) 11

Restatement (Second) of Agency (1957)

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Patrick J. Rohan *et al.*, *Real Estate Brokerage Law and Practice* (2001)

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W. Seavey, *Law of Agency* (1964) 11, 23, 36, 39

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STATUTES AND REGULATIONS INVOLVED

1. The Fair Housing Act ("FHA" or the "Act"), 42 U.S.C. § 3601 *et seq.*, the relevant provisions of which are printed in Respondents' Appendix ("Resp. App.") 11-21.

2. 24 C.F.R. § 100.20 (2002) and former 24 C.F.R. § 103.20 (1999). Resp. App. 22.

3. The California Real Estate Law, California Business & Professions Code § 10000 *et seq.* (West 1987 & Supp. 2002). Resp. App. 23-47.

4. California Code of Regulations, tit. 10, § 2700 *et seq.* (2002). Resp. App. 48-62.

STATEMENT OF THE CASE

Respondents are Emma Mary Ellen Holley who is African-American, her husband David Holley who is Caucasian, their adopted son Michael Holley who is African-American, and Brooks Bauer, a general contractor. JA 3-4. This action arose out of the Holley family's attempt to buy a house being constructed by Bauer in Twenty-Nine Palms, California. JA 8-13. The house was listed for sale by Triad Realtors. JA 8.

In November 1996, the Holleys toured the house with Triad salesperson Terri Stump and decided to make an offer. JA 9. That same evening, Mrs. Holley called Bauer, told him she was interested in his house, and discussed the terms of their proposed offer, which he said sounded "pretty good." JA 10. Bauer told Mrs. Holley that she would have to make the offer through Triad. JA 10. Bauer then called Triad salesperson Grove Crank and told him of

the Holleys' intention to make an offer and that he was looking forward to receiving it. JA 10.

Later that evening, Mrs. Holley received a call from Stump, in which she stated that other Triad salespersons did not think the Holleys' offer was sufficient. JA 10-11. The Holleys declined to raise their offer. JA 11. The next day, at Triad's office, Stump told the Holleys that, after speaking with Crank and another Triad salesperson, they had decided the Holleys' offer was too low to present to Bauer. JA 11. The following week, Bauer spoke with Crank, inquiring about the Holleys' anticipated offer. JA 13. Crank said to Bauer, "No, you don't want to f*** with those niggers," and referred to the Holleys as a "salt and pepper team." JA 13. Bauer assumed the Holleys had changed their minds about the offer. JA 13-14. Bauer ran into Mrs. Holley several months later, and learned that the Holleys had, in fact, wanted to purchase his house, but that Triad had "cost" him the sale. JA 14. On November 14, 1997, respondents filed suit against Crank and Triad, alleging, *inter alia*, that the defendants had discriminated on the basis of race in violation of the federal Fair Housing Act ("FHA" or "Act"), 42 U.S.C. §§ 3601 *et seq.* (the "*Triad*" case, No. 97-8368). Record [case 97-8368] 1.[1]

During the *Triad* case, respondents became aware that David Meyer was Triad's licensed officer/broker. Respondents twice moved to add Meyer as an additional defendant in the *Triad* case, but the district court denied

[1] The Clerk of Court has requested that the district court transmit the record in the *Triad* case, case 97-8368, with the record in this case, because they were consolidated in the district court (Record 10) and filings in this case were at times docketed in the *Triad* case.

those motions. Record [case 97-8368] 11-12, 17, 42-43, 55. In October 1998, respondents commenced this separate action against Meyer, alleging the same FHA violations they had alleged against Crank and Triad in the *Triad* case. JA 2-24. The following facts relate to Meyer and his relationships to Crank and Triad. These facts, and those stated in the text of respondents' arguments, are taken from respondents' complaint and the materials submitted in connection with Meyer's summary judgment motion.[2]

Meyer had three roles at Triad: (1) officer/broker; (2) president; and (3) sole shareholder. JAL 14-16, 29-30, 36-38, 44-46, 48-50, 120-23. Meyer was the only corporate officer of Triad who was qualified to hold a broker's license and who was therefore responsible for Triad's initial receipt, and subsequent maintenance, of its corporate broker's license. JA 4, 7-8; see pp. 13-21, *infra*.

As of 1996, when Crank discriminated against the Holleys, Meyer had been a licensed California real estate broker for almost 25 years. JAL 79. He was the founding officer/broker of Triad in 1974, as well as one of the founding shareholders. JAL 78-79, 122. He had been president of Triad for almost 20 years. JAL 121. Meyer had been a member of the California Association of REALTORS®

[2] This case involves review of both the district court's decision granting in part petitioner's motion to dismiss and the district court's subsequent decision granting petitioner's motion for summary judgment. With respect to the former, this Court "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, ___, 122 S. Ct. 992, 995 n.1 (2002). With respect to the latter, all factual matters in the record must be construed most favorably to respondents as the parties opposing that motion. *E.g.*, *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

("CAR") and the National Association of REALTORS® ("NAR") for over 25 years. JAL 128-129. Crank began to work as a Triad salesperson under Meyer's supervision in 1980. JA 40; JAL 60-74.

Although Meyer was Triad's sole shareholder from 1978 until at least February 1995, he claims that he "transferred" ownership of Triad to Crank at that time, despite admitting that no documents exist reflecting that alleged transaction. JAL 122-126. The transfer of ownership of the corporation allegedly took place when, in Meyer's conversations with Crank, they "decided that [Crank] would carry on with the company, and [Meyer] would continue only as its principal broker until such time as [Crank] could get his [broker's] license." JAL 124.[3] Crank never did obtain his broker's license. JA 40-41.

Meyer continued to serve as Triad's officer/broker and president and, as such, was the sponsoring broker for the renewal of each of the Triad salespersons' licenses. JAL 139-40. Although he acknowledged that the operation of Triad was still his responsibility, Meyer claimed that during the time period of the alleged discrimination, he was no longer "involved in the day-to-day management of the business," although "technically . . . still an officer with the corporation." JAL 145, 151. Between April 1995 and August 1998, Meyer did not personally supervise Triad's salespersons, but relied on Crank to do so. JAL 136-37.

[3] Respondents alleged in their complaint that Meyer was Triad's sole shareholder at the time of the discrimination. JA 7. Although Meyer denied ownership, the court of appeals held that, given the unusual circumstances of the "transfer" of the corporation, the issue of Meyer's ownership was disputed and should go to trial. JA 7; 65 n.4.

It is undisputed that Crank and Triad are unable to pay any judgment in this case. Record 15 & 43, at 30, 39-41; Record [case 97-8368], 98 at 3, ¶ 8. The district court ruled in a related case that Triad's insurance policy did not cover racial discrimination claims like respondents' and provided only $10,000 for the expenses of defending such claims.[4]

The district court granted in part Meyer's motion to dismiss and later entered summary judgment in Meyer's favor. JA 25-35, 48-55. Thereafter, at the request of the parties, the court stayed the *Triad* action, and certified its judgment in this case pursuant to Fed.R.Civ.P. 54(b), so that the issue of Meyer's liability could be decided. Pet. App. 4; Record [case 97-8368] 107.

On July 31, 2001, the Ninth Circuit reversed the district court's dismissal of the FHA claims against Meyer. JA 71. The court of appeals held that the district court had erred in ruling that Meyer could not be vicariously liable under the FHA based on his positions as Triad's president and officer/broker. JA 62, 71. The court of appeals also held that summary judgment for Meyer was inappropriate with respect to his role as Triad's sole owner, because there was a disputed factual issue as to whether Meyer owned Triad at the time of Crank's discrimination, which, if

[4] Respondents have lodged with the Clerk of Court 12 copies of the district court's summary judgment order in the related case *Legion Insur. Co. v. Crank*, case 98-8617, which was referenced by the district court in its orders in this case. That order also was before the court of appeals. JA 27, 50; Resp. Ct. App. Ex. Rec. 245; Case 98-8617, docket no. 24 at 5-6, 14.

resolved in respondents' favor, could make Meyer liable. JA 63-67, 71.

On January 28, 2002, Meyer filed a petition for a writ of certiorari with this Court, which granted the writ on May 20, 2002.

SUMMARY OF ARGUMENT

1. Vicarious liability issues under the FHA should be decided based on common-law agency principles, as adapted to the FHA's objectives. Cf. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545 (1999) (Title VII case). Under common-law principles, a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement (Second) of Agency § 219(1) (1957). A master-servant, or principal-agent, relationship is based on the agent acting subject to the control of the principal. See Restatement §§ 1, 220(1).

Meyer's relation to Crank was that of principal-agent. Meyer was not just an ordinary corporate manager occupying a senior position in Triad's hierarchy. Based on California real estate law – whose licensing requirements are reflected in similar laws in all other states – Meyer, the officer/broker in charge of supervising Crank, had the legal duty to control Crank's activities. Even when a broker practices in a corporate form, state law requires that this control be exercised by a broker-qualified *individual*, and that this designated supervising broker be responsible for the firm's salespersons, the same as are non-corporate brokers.

2. Real estate brokerage is a highly regulated business. Each state has a detailed set of laws and regulations, but virtually all states have licensing systems that include the following basic features: (a) two levels of licenses, with the higher level licensee ("broker") being allowed to deal with the public and the lower level licensee ("salesperson") being allowed only to work for a broker; (b) brokers are legally responsible for any liability caused by their salespersons; (c) while most brokers operate as sole proprietorships, California and many other states allow them to use the corporate form; and (d) states that allow corporate brokers require that the company appoint an individual supervising broker who meets the same licensing qualifications as for an individual broker and who must exercise the same degree of control over the firm's salespersons as does an individual broker over his. In addition, California, like most other states, specifically requires that brokers ensure their salespersons' compliance with fair housing laws.

Meyer was Triad's designated officer/broker from the time he founded the firm in 1974. As a result, he had the right, indeed the duty, to control Crank's license-related activities, thereby making him Crank's principal for acts under the license.

3. Because all brokers, regardless of their business form, have the same duty to supervise and control their salespersons, all should be liable for the FHA violations of the salespersons acting under their licenses. Vicarious liability for brokers is supported not only by common-law principles, but also by the FHA's objectives, as reflected in the following: (a) the FHA's legislative history, showing Congress' rejection of the idea that liability should turn on changes in business forms; (b) a large body of early judicial

decisions endorsing brokers' vicarious liability, regardless of corporate form; (c) U.S. Department of Housing and Urban Development ("HUD") regulations providing for vicarious liability for anyone who has "the right to direct or control" the person violating the FHA; (d) Congress' endorsement of the early judicial decisions and HUD's first "right to direct or control" regulation in the 1988 Fair Housing Amendments Act; and (e) post-1988 decisions by lower courts and HUD administrative law judges ("ALJs") adding to the overwhelming consensus that brokers in Meyer's position should be liable for their agents' discrimination, regardless of their business form.

4. Holding Meyer liable is fair. The rule applied to him would be the same one that governs the vast majority of brokers in the United States, who have not incorporated and who are subject to the common-law principle of *respondeat superior*. Meyer's argument for non-liability is based not only on his adoption of a corporate form, but also on his claimed "right" to thereafter abdicate his duties to supervise and control his company's salespersons. To hold that this conduct insulates Meyer from FHA liability would be to create a blueprint for brokers to exempt themselves from the FHA, thereby frustrating the FHA's primary objective of ending discrimination.

5. Even if Meyer is not vicariously liable as Crank's principal, he should be liable under other well-established common-law principles that are applicable in this case. First, because Meyer was a licensee and Crank committed his FHA violations while operating under that license, Meyer is liable under Restatement § 214, cmt. *b*: "When a license is required for the performance of acts, one having a license who delegates performance of the acts to another is subject to liability for the negligence of the other." The

key license in this case was Meyer's, not Triad's. The qualifications necessary for a broker's license (*e.g.*, passing a written examination and completing certain educational requirements) could only be satisfied by Meyer, not Triad. Without Meyer's license, Triad could exist, but it could not engage in brokerage activities, including the employment of Crank as a salesperson.

Second, Meyer's negligence in supervising and controlling Crank, including the improper delegation of his broker duties to Crank, justifies holding Meyer liable under traditional corporate law principles that impose liability on corporate officers who breach their statutory duties, here imposed by state licensing laws. Beginning in 1995, over a year before the events of this case, Meyer abandoned his duties at Triad, even though he remained legally responsible for ensuring Triad's compliance with real estate and fair housing laws. Meyer's abdication of his duties is a classic example of negligent, if not reckless, supervision, for which licensed professionals are generally held liable regardless of their corporate form and for which common-law principles provide a remedy, as should the FHA.

6. Meyer's conduct as Triad's sole stockholder provides an independent ground for making him liable under traditional corporate "veil piercing" and "alter ego" principles. Under Meyer's control, Triad failed to observe basic corporate formalities and was so underfunded that it is judgment-proof. Either of these facts is sufficient to justify veil piercing in an FHA case.

7. Thus, the judgment of the court of appeals that Meyer may be liable for Crank's illegal discrimination was correct. It is axiomatic that "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Resources*

Defense Council, Inc., 467 U.S. 837, 842 (1984). The court of appeals adopted a vicarious liability standard that would govern in all FHA cases. But such a broad rule is unnecessary here. All that is needed is a uniform rule of vicarious liability under the FHA applicable to corporate officer/brokers charged with the duty of supervising the licensed activities of the corporation. Based on common-law principles, adapted to the objectives of the FHA, the rule should be that a corporation's officer/broker, charged under state licensing law with the duty to supervise and control the licensed activities of corporate salespersons, is liable for the FHA violations committed by those salespersons acting under the corporation's license.

ARGUMENT

I. BASED ON COMMON-LAW PRINCIPLES AND CONSISTENT WITH THE POLICIES OF THE FAIR HOUSING ACT, A CORPORATION'S OFFICER/BROKER, CHARGED WITH THE DUTY TO SUPERVISE AND CONTROL THE LICENSED ACTIVITIES OF SALESPERSONS, IS VICARIOUSLY LIABLE FOR FAIR HOUSING ACT VIOLATIONS COMMITTED BY THOSE SALESPERSONS ACTING UNDER THE CORPORATION'S LICENSE.

The parties, their *amici*, and the United States agree that although the text of the FHA does not expressly address the issue of vicarious liability, the Act incorporates traditional common-law principles of torts and agency, including the doctrine of *respondeat superior*. Early in the Act's history, this Court ruled that an action under this statute "sounds basically in tort" and "is analogous to a number of tort actions recognized at common law." *Curtis*

v. Loether, 415 U.S. 189, 195 (1974). In determining the scope of vicarious liability under a federal civil rights statute, however, the Court does not incorporate the tort or agency law of any particular state, but rather looks for guidance to general common-law principles and then adapts those principles to carry out the statute's objectives. *Kolstad v. American Dental Ass'n*, 527 U.S. at 545 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 n.3 (1998)) (following this two-step analysis in Title VII case); *Smith v. Wade*, 461 U.S. 30, 34 (1983) (same in § 1983 case).

The Restatement (Second) of Agency (1957) ("Restatement") is this Court's traditional starting point for determining common-law principles of vicarious liability for tortious conduct. *Kolstad*, 527 U.S. at 542; *Faragher*, 524 U.S. at 802. The Restatement explains that agency is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act," Restatement § 1, and defines the doctrine of *respondeat superior* as "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement § 219(1) (quoted with approval in *Faragher*, 524 U.S. at 793). That doctrine is a well-accepted part of the common law of torts. *Philadelphia and Reading Railroad Co. v. Derby*, 14 How. (55 U.S.) 468, 486 (1852); see also *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392 (1982) (citing Restatement §§ 215-216, 219; W. Prosser, *Law of Torts* §§ 69-70 (4th ed. 1971); W. Seavey, *Law of Agency* § 83 (1964)).

Before these general common-law principles can be applied in this case, however, the nature of the relationship between Meyer, Triad, and Crank must be examined. This relationship is not, as petitioner claims, solely a creature of corporate law. Instead, it is rooted in and governed by California real estate licensing law. Thus, this case requires a *three*-step analysis: (1) examining the state licensing law out of which the officer/broker-salesperson relationship arises; (2) applying common-law principles to that relationship; and (3) adapting these common-law principles as necessary to ensure that they carry out the FHA's objectives.

Consistent application of the FHA requires the adoption of a uniform federal standard addressing real estate broker liability for the acts of salespersons. There is no dispute that an individual broker licensee is liable for torts committed by a salesperson acting under the individual's license. The rule that should arise out of this case is that a corporation's officer/broker, charged under state licensing law with the duty to supervise and control the licensed activities of corporate salespersons, is similarly liable for the FHA violations committed by those salespersons acting under the corporation's license.

The key to this case, all but ignored by petitioner, is Meyer's status as a licensed real estate officer/broker. Petitioner looks to the corporate form in which Meyer did business and stops there, choosing not to discuss the professional and fiduciary duties imposed on him – and all brokers nationwide – by the licensing laws under which brokers operate regardless of their business form. The duties imposed by state licensing laws, however, are crucial to understanding why Meyer should be held personally responsible for Crank's discrimination.

A. STATE LICENSING LAW ESTABLISHES THAT MEYER AND CRANK HAD A PRINCIPAL-AGENT RELATIONSHIP FOR PURPOSES OF THE FHA.

As the designated officer/broker of Triad, Meyer was not just another corporate officer. First and foremost, he was the state licensee whose qualifications permitted Triad to operate as a corporate broker and who was personally responsible for Triad's salespersons. Although California and other states allow a broker to hold his license in a corporate form, those same laws impose on the corporate officer/broker a personal duty to supervise salespersons and to ensure their compliance with the law. Respondents do not dispute that Triad's corporate form may protect Meyer from personal liability for torts arising out of corporate activities for which a real estate license is not required. Rather, respondents contend that Triad's corporate form does not protect Meyer from personal liability for torts arising out of that subset of corporate activities for which a real estate license is required.

1. For decades before enactment of the FHA, state real estate laws defined the broker-salesperson relationship as one of principal-agent. State regulation of the real estate industry began in California in 1916. 1916 Cal. Stat. c. 758. By 1949, 36 states had adopted licensing laws, most of which were based on the California law. 10 Patrick J. Rohan *et al.*, *Real Estate Brokerage Law and Practice* § 2.01[2] (2001). Today, California and all other states require all real estate brokers and salespersons to be licensed, imposing examination and educational prerequisites prior to issuance of a license, and in all but two states, completion of continuing education prior to license

renewal. See Cal. Bus. & Prof. ("B&P") Code §§ 10150.6, 10151, 10152, 10153 & 10153.2 (West 1987 & Supp. 2002); 10A Rohan, *supra*, §§ 6.03, 6.04[2], 6.07 (compilation of basic licensing requirements for all 50 states and the District of Columbia). Real estate brokerage has evolved into a highly regulated profession. As recognized in California and other states, a primary purpose of that regulation is to protect the public. *Norman v. Department of Real Estate*, 93 Cal.App.3d 768, 778, 155 Cal.Rptr. 715 (1979); 10A Rohan, *supra*, § 6.01, at 6-4.

The relationship between broker and salesperson, to which the Restatement principles are to be applied here, is prescribed by state law. Under the licensing law of California and the other states, there are generally two classes of licensee – real estate broker and real estate salesperson. See, *e.g.*, B&P Code §§ 10011, 10131, 10132 (West 1987). See generally Charles J. Jacobus, *Real Estate Principles* 386 (Prentice-Hall: 8th ed. 1999). A salesperson can provide services only under the direction and control of a licensed real estate broker. B&P Code §§ 10132, 10137. The licensed broker performs the services for the public, and the salesperson performs services for the broker under whom he is licensed. *Grand v. Griesinger*, 160 Cal.App.2d 397, 405, 325 P.2d 475 (1958). Thus, the salesperson's ability to function in the real estate business is totally dependent on his agency relationship with the broker. B&P Code § 10132. The other part of that equation is that the broker is required to exercise reasonable supervision over the salesperson. B&P Code § 10177(h) (West 1987); Cal. Code Reg., tit. 10, § 2725 (2002); *Grand*, 160 Cal.App.2d at 405.

The special relationship between broker and salesperson, dictated by state law, establishes the broker as principal and the salesperson as agent. B&P Code § 10132; *Gipson v. Davis Realty Co.*, 215 Cal.App.2d 190, 206, 30 Cal.Rptr. 253 (1963). Because the "salesperson is a means by which a broker can expand his sales force" by gaining more listings, sales, and commissions, the broker must "take ultimate responsibility for any mistakes the salespersons make." Jacobus, *supra*, at 386. Thus, the law is undisputed that an individual broker licensee is vicariously liable for the torts of his salespersons committed within the scope of their licensed activities. *Gipson*, 215 Cal.App.2d at 209-10. See Br. of *Amicus Curiae* California Association of REALTORS® ("CAR Br.") 7.

2. Although states allow brokers to do business in a number of different forms, all licenses are issued based on the individual broker's qualifications. A broker's license may be held in several different business forms. In each, however, the obligation to ensure the salespersons' compliance with the law runs as a personal duty to the person who is the licensed professional. Although the business form chosen by the broker may change, that change does not alter the fundamental agency relationship between broker and salesperson.

The simplest business form for a broker is a sole proprietorship under the broker's own name or a fictitious name. Jacobus, *supra*, at 392. A broker can also operate in a partnership with other brokers or as a corporation. *Id.* Most states allow brokers to do business in the corporate form. See state law citations, Resp. App. 1-3. When a broker decides to use a corporate form, the usual practice, as was followed here, is that only a single individual at the firm needs to meet the broker qualifications. Arthur

Gaudio, *Real Estate Brokerage Law*, § 48, p. 60 (1987). When these requirements are met, the state may issue a single license covering both the individual and the firm, as occurs in California, or, as in the majority of states, the state may require a separate license for each. *Id.*, at 60 n.5. See state law citations, Resp. App. 3-5. In either situation, the states uniformly allow the firm itself to hold a broker's license and engage in real estate activities only so long as the *individual* in question (or a like-qualified substitute) continues to meet the applicable licensing qualifications for a broker. *Id.*

The law of California is illustrative. A corporation may hold a real estate broker's license, but only if it designates an officer to serve as the officer/broker of the corporation. B&P Code §§ 10158 & 10211. The officer/broker must be a person who is qualified to hold a broker's license. *Id.* § 10211. A California corporate real estate broker operates "only through and because of" the license of its designated officer/broker. *Amvest Mortgage Corp. v. Antt*, 58 Cal.App. 4th 1239, 1243, 68 Cal.Rptr.2d 457 (1997) (emphasis added). No acts for which a real estate license is required may be performed for, or in the name of, a corporation when there is no designated corporate officer/broker. Cal. Code Reg., tit. 10, § 2740; *Amvest*, *supra*, 58 Cal.App.4th at 1243 & n.4. Here, Triad held a corporate real estate broker's license and Meyer was its designated officer/broker. Meyer was the only such broker affiliated with Triad. Crank and the other Triad agents were salespersons, not brokers, and thus could work only under a broker's license. B&P Code §§ 10132, 10137.

3. Under state licensing law, corporate officer/brokers have the same duties as individual brokers. The obligations of state licensing law do not stop at the

corporate veil. One of the most important duties imposed on a broker is that he exercise supervision and control over the salespersons working under his license. That requirement applies to a broker no matter the form in which he does business. Thirty-nine states and the District of Columbia allow a corporation to hold a broker's license. See state law citations, Resp. App. 1-3. Each requires the corporation to designate a qualified individual to serve as officer/broker or in a similar position of responsibility. With the possible exceptions of Louisiana and Nevada,[5] each also imposes on the qualified individual the personal duty to supervise or be responsible for the activities of the corporation and its salespersons for which a license is required. See state law citations, Resp. App. 5-8.

Again, California law is illustrative of the common practice throughout the country. The California real estate law charged Meyer – and Meyer only – with supervisory responsibility over Crank and the other Triad salespersons, requiring that Meyer, as officer/broker

> "shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary *to secure full compliance* with the provisions of this division, *including the supervision of salespersons licensed to the corporation* in the performance of acts for which a real estate

[5] Although Nevada law is silent on supervisory responsibility, the Nevada Supreme Court has construed that law to impose personal responsibility upon the designated officer/broker for the corporation's fiduciary obligations. *Jory v. Bennight*, 91 Nev. 763, 767, 542 P.2d 1400 (1975).

license is required." B&P Code § 10159.2 (emphasis added).

For a corporate real estate broker to operate lawfully, it must "conduct[] its brokerage business *if at all* under the *active* aegis of its designated broker." *Milner v. Fox*, 102 Cal.App.3d 567, 575, 162 Cal.Rptr. 584 (1980) (emphasis added). The designated officer/broker, not the corporate entity itself, is charged with the responsibility to ensure corporate compliance with the real estate law. *Norman*, 93 Cal.App.3d at 776-77; *Milner*, 102 Cal.App.3d at 575. Otherwise, without any fixed responsibility on a licensed individual, the statutory purpose would be frustrated. *Norman, supra.*

The fact that Meyer chose to place his license in a corporate form does not change the nature of his personal responsibility to supervise Triad's salespersons. The responsibilities and qualifications of all brokers in California are the same, regardless of whether they hold their licenses as individuals, as sole proprietorships doing business under a fictitious name, as partners in a real estate partnership, or as officers of a licensed corporation. See B&P Code §§ 10130, 10137.1, 10153, 10153.2, 10159.5, 10170.5, 10171.5, 10211. All brokers must exercise reasonable supervision. B&P Code § 10177(h). The grounds for revocation of a license for individual licensees and corporate officer licensees are identical. B&P Code §§ 10176, 10177 (West 1987). Those grounds include, *inter alia*, as an individual broker licensee, failing "to exercise reasonable supervision over the activities of his [ ] salespersons," or, as an officer/broker licensee, failing "to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required." B&P Code § 10177(h).

The conclusion that the designated officer/broker is a principal responsible for directing and controlling salesperson compliance with the law is supported by the legislative history of B&P Code § 10159.2. In 1979, that provision was added to the real estate law by AB 985, imposing explicit duties of supervision and control on the designated officer/broker. Contemporaneous legislative analyses state that the amendment "attempts to insure licensed supervision of real estate corporation activity by holding designated officers *personally responsible* for that supervision," and that "the only way that the active participation of the licensed individual can be ensured is by *'piercing the corporate veil' and making the individual licensee vulnerable to action on account of corporate misdeeds, or on account of failure to fulfill corporate responsibilities.*" Staff Analysis of AB 985 for the Senate Committee on Business & Professions at 2 (7/11/79) (emphasis added) and Ass. Comm. on Labor, Employment, & Consumer Affairs, Bill Lockyer, Chairman, Statement on A.B. 985 at 2 (1979) (emphasis added), reproduced at Resp. App. 63-67.[6]

The 1979 amendments to the real estate law arose out of a concern by the legislature that brokers were avoiding their duties to supervise their salespersons under cover of the corporate veil. By 1979, California had experienced a significant increase in the number of corporate real estate firms, rising from a steady 2% of total brokers between the

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[6] Policy committee analyses such as these are commonly recognized by California courts as evidence of legislative intent. See, *e.g.*, *Hutnick v. U.S. Fidelity and Guaranty Co.*, 47 Cal.3d 456, 465 n.7, 253 Cal.Rptr. 236 (1988); *In re Marriage of Brigden*, 80 Cal.App.3d 380, 391, 145 Cal.Rptr. 716 (1978).

1920s and 1950s to 11%, or 11,500, by 1979. *Semi-Annual Bulletin of the Real Estate Department*, Vol. II, No. 2 at 494 (10/15/21); *Directory of Brokers and Salesmen*, Vol. XXXVII at 14, 23-931, 1031-1081 (1956-57); *California Department of Real Estate Reference Book* 670 (1981); Ass. Comm. Statement on AB 985 (Resp. App. 66). In fact, it was this "proliferation" of these small, closely held corporations operating without adequate broker supervision that prompted the California Department of Real Estate ("DRE") to propose the 1979 amendments placing individual responsibility for supervision on each corporation's designated officer/broker. See Legislative Proposal, Department of Real Estate, Bill Control No. 12-79-113 at 2, (2/9/79), which became AB 985. Resp. App. 68-70. Corporate brokers now make up about 14% of the total number of brokers in California. CAR Br. 6.

4. Corporate officer/brokers have the same duty as individual brokers to ensure salespersons' compliance with fair housing laws. The California Real Estate Commissioner has promulgated regulations governing broker supervision. The regulations specify that a broker "shall exercise reasonable supervision over the activities of his or her salespersons," including establishing policies "*[f]amiliarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination*" and a system for monitoring compliance with such policies. Cal. Code Reg., tit. 10, § 2725 (emphasis added). That duty of supervision applies equally to an officer/broker as it does to an individual broker. B&P Code § 10159.2. To give further context to the requirement that both individual brokers and officer/brokers "familiarize" salespersons with the requirements of fair housing laws, the regulations spell out in detail *30* separate types of discriminatory conduct in which real estate licensees are specifically prohibited from engaging. Cal. Code Reg., tit.

10, § 2780(a)-(dd). Over 30 states have prohibitions against discrimination in their licensing laws. See state law citations, Resp. App. 8-9.

Implicit in these California regulations is the recognition that by establishing and enforcing a fair housing policy, and providing adequate training, a supervising broker can go a long way toward ensuring that his agents comply with the FHA. See Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 Harv. C.R.-C.L. L. Rev. 279, 327 (2001). Training, or the lack of it, affects how salespersons behave, and providing FHA training to salespersons is neither burdensome nor difficult. Moran, *supra*, at 328. Yet in this case, Meyer never provided any such training to the Triad salespersons. JAL 144.

5. Common-law principles, not the existence of state civil liability, govern Meyer's FHA vicarious liability. Petitioner concedes that, as Triad's designated officer/broker, he was responsible for the supervision of Triad's salespersons, but posits that it is a duty which does not give rise to civil liability. Br. of Petitioner ("Pet. Br.") 29. But the California decision petitioner relies on, *Walters v. Marler*, 83 Cal.App.3d 1, 34-5, 147 Cal.Rptr. 655 (1978), was decided a year *before* the real estate law was amended to impose supervisory duties and responsibilities on the corporate officer/broker.[7] In fact, in a number of states,

[7] The decision in *In re Grabau*, 151 B.R. 227 (N.D. Cal. 1993), regarding liability for negligent supervision does not affect this case. The holding was clearly limited by the district court to a finding "as a matter of law that negligent supervision, without any active participation in the fraudulent transaction is not sufficient to create a fiduciary

(Continued on following page)

the officer/broker explicitly is liable for corporate breaches.[8]

In any event, respondents do not rely, nor should this Court, on the existence of state tort liability to give rise to FHA liability. Liability here arises under the FHA itself, which, according to this Court, "defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Curtis*, 415 U.S. at 195. Even if California law would not impose state tort liability on Meyer, that law does impose supervisory obligations on him, establishing that he, not Triad, was responsible for Crank's compliance with fair housing laws.[9] That is enough for vicarious liability under the FHA.

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relationship *for the purposes of non-dischargeability*." 151 B.R. at 233 (emphasis added).

[8] See Minn. Stat. Ann. § 82.20(5) (West 1999); Tex. Rev. Civ. Stat., art. 6573a, § 1(c) (2002); *Circle T Corp. v. Deerfield*, 166 Colo. 238, 244, 444 P.2d 404 (1968); *Kimball Bridge Road at Big Creek v. Everest Realty Corp.*, 141 Ga.App. 835, 836-37, 234 S.E.2d 673 (1977); *Century 21 Action Realty II v. Smith*, 533 So.2d 626, 627 (Ala.App. 1988).

[9] That Meyer may be punished for his failure to exercise his supervisory duties through the state disciplinary process does not absolve him from FHA liability. Congress' policy of providing for fair housing throughout the United States cannot be allowed to rest on administrative enforcement by the real estate commissions of the various states. See generally 42 U.S.C. § 3615 (invalidating any state law "that purports to require or permit any action that would be a" violation of the FHA). Information available in California, for instance, shows that since 1990 the Department of Real Estate has *never* disciplined a licensee for violations of state or federal fair housing laws. See Letter from Thomas Pool, Assistant Commissioner, Legislation & Public Information, California Department of Real Estate, to Mark Stivers, Chief Consultant, Senate Housing & Community Development, California State Senate, 12 copies of which have been lodged by respondents with the Clerk of Court.

B. THE RESTATEMENT, CONSISTENT WITH THE POLICIES OF THE FHA, ESTABLISHES THAT MEYER AND CRANK HAD A PRINCIPAL-AGENT RELATIONSHIP FOR PURPOSES OF THE FHA.

Based on the nature of the Meyer-Crank relationship, dictated by the state licensing law, it is apparent the common law would view this as one of principal-agent, for it had all the indicia of such a relationship. According to *amicus* CAR, "[b]rokers, *through their real estate agents*, meet with buyers and sellers, sometimes in person, often times at the real property in question, and sometimes over the phone to establish relationships," (CAR Br. 12) (emphasis added), a statement that describes the "heart of agency" – *Qui facit per alium facit per se* – he who acts *through* another acts by or for himself. *Channel Lumber Co., Inc. v. Porter Simon*, 78 Cal.App.4th 1222, 1227, 93 Cal.Rptr.2d 482 (2000).

Meyer's statutorily mandated duty to control the activities of the Triad salespersons defines the agency relationship between them. It is this duty to control, grounded in state licensing law, that is the single most important element in creating a master-servant relationship. Seavey, *supra*, at § 84(C). Actual control is unnecessary – all that is needed is the *right* to control. *Id.* See also Restatement § 220, cmt. *d* on subsec. (1) ("there may even be an understanding that the employer shall not exercise control").

While Triad may serve as the principal for purposes of Meyer and Crank's employment with the corporation, it does not follow that the corporation is the only principal for purposes of Crank's compliance with the FHA. See

Restatement § 20, cmt. *f* (an agent may have joint principals). The state licensing law under which Triad, Meyer, and Crank operated created a separate and independent relationship between Meyer as designated broker and Crank as salesperson. At bottom, that statute-based relationship was built on the right, indeed the obligation, of Meyer to direct and control the conduct of salesperson Crank. Although Triad was the nominal employer, the professional nature of the licensed activities in which both Meyer and Crank were engaged renders their relationship, with respect to those licensed activities, one of principal-agent, not just one of supervisor-employee serving the corporate principal Triad. California licensing law makes clear that, for purposes of ensuring compliance with the FHA, Meyer is a principal and Crank is an agent, operating under Meyer's direction and control.

1. The conclusion that vicarious liability should be imposed on Meyer as an officer/broker best reflects common-law principles informed by the FHA's purposes. This result is consistent with Congressional concern expressed in the FHA's legislative history that business forms not be used to escape liability, see pp. 25-27, *infra*, and the FHA's interpretation by numerous lower courts and HUD to hold liable those persons, regardless of business form, who have the right to direct and control persons engaged in discrimination, see pp. 27-34, *infra*.

This result is also aligned with the Court's recognition that the FHA's objective "to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601, is a policy "Congress considered to be of the highest priority," *Trafficante v. Metropolitan*

Life Ins. Co., 409 U.S. 205, 211 (1972), requiring that the FHA be given a "generous construction." *Id.* at 212; *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995).

2. The FHA's legislative history demonstrates Congress' express concern that business forms not be used to obtain self-exemption from the coverage of the Act. The legislative history of the 1968 FHA demonstrates that Congress was aware of, and intended to preclude, the use of business forms to avoid FHA liability. That awareness is evident in the key Senate floor debates on how broadly to write the proposed exemption of certain single-family dwellings from coverage under the Act.

Under the FHA as enacted, the sale or rental of a single-family dwelling by the owner of that dwelling (who owns fewer than three other such dwellings) is exempt from most of the substantive provisions of the Act. 42 U.S.C. § 3603(b)(1). However, the involvement of a real estate professional in any aspect of that sale or rental subjects the transaction to all the anti-discrimination requirements of the FHA. *Id.*

During the floor debates, Senator Byrd proposed an amendment that would have exempted private owners of single-family dwellings *and* real estate brokers, agents, and salespersons of such dwellings *who acted in accordance with the owner's instructions*. See 114 Cong. Rec. 4965 (1968). In opposing the Byrd amendment, Senator Mondale, the Act's principal sponsor, noted that the amendment would give individual homeowners and their real estate agents "a license to discriminate." *Id.* at 4966. Senator Mondale also observed that, even though the exemption proposed only would be available for *individuals*, it would be too easy for potential defendants to obtain

its protection simply by changing their corporate form. Thus, according to Senator Mondale: "All that would have to be done would be to make a technical change in ownership from partnerships or corporations to that of a private person. If this amendment were adopted, little, if anything, would be left" of the FHA as proposed. *Id.* at 4974. The Byrd amendment was defeated. *Id.* at 4977.

Later, in connection with a separate amendment proposed by Senator Byrd (*id.* at 5640), Senator Mondale again stated his desire that corporate forms not be used to escape responsibility for FHA violations. That proposed amendment was designed to expand the single-family-house exemption from owners of one such house to owners of three. Senator Byrd assured Senator Mondale that his expanded exemption would apply only to individual homeowners, not to corporations. *Id.* at 5643. When Senator Mondale expressed concern that the exemption should not apply to an "interest held by an individual *through* a corporate structure" because this device could be used to "*circumvent*" the law (*ibid.* (emphasis added)), Senator Byrd agreed to insert the word "individual" in front of "owner" to make clear that only natural persons could qualify for the exemption. *Id.* at 5643-44. The Byrd amendment was approved with the change. *Id.* at 5644.

The treatment of these two Byrd amendments shows Congress' concern that FHA liability not turn on changes in business forms. By the same reasoning, broker responsibility under the FHA should not depend on differences in

ownership forms that do not reflect real, substantive changes in a broker's responsibilities.[10]

3. Early judicial enforcement of the FHA imposed vicarious liability on brokers, regardless of their business form, for the discriminatory practices of salespersons acting under the license. In the first decade of enforcement of the 1968 Act, the lower courts, often at the urging of the United States, developed a large and cohesive body of precedent establishing that brokers, regardless of business form, are responsible for discrimination committed by salespersons under their direction and control. *E.g.*, *Northside Realty Assocs. v. United* States, 605 F.2d 1348, 1352-54 (5th Cir. 1979); *Marr v. Rife*, 503 F.2d 735, 740-42 (6th Cir. 1974); *United States v. Bob Lawrence Realty, Inc.*,

[10] The floor debates also show Congress' intent that the practices of real estate brokers be broadly covered by the Act. Aware that 80% of the single-family homes in the United States were sold with the use of real estate agents, see *id.* at 5219 (remarks of Senator Lausche), FHA proponents made clear that the Act's anti-discrimination commands were legitimate restraints on *real estate brokers' behavior* called for by public policy. *Id.* at 4976 (remarks of Senator Hart). For example, Senator Hart, an FHA proponent, remarked, "I have no compunction in limiting the State-licensed individual; namely, the real estate broker from being a participant in it [discrimination], willingly or not." *Id.* at 5221. When an amendment was offered to exempt the sale of single-family houses from the Act even where a real estate professional was involved, *so long as the owner does not instruct the agent to discriminate*, see *id.* at 5214, FHA proponents countered that such a proposal requiring proof of an illegal instruction between owner and real estate broker would be "impossible to produce." *Id.* at 5216 (remarks of Senator Percy). Senator Percy further advocated "plugging every loophole in this bill." *Id.* See also *id.* at 5218, 5220-21 (further remarks of Senators Mondale, Dominick, and Hart regarding the difficulties of proof and the increase in opportunity for discrimination). That proposed amendment was defeated. *Id.* at 5221-22.

474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826 (1973). These decisions often made specific reference to a broker's "control" of his salespersons with respect to FHA compliance. *E.g.*, *Northside*, 605 F.2d at 1353-54; *Marr*, 503 F.2d at 742. Many held personally liable individuals who were the supervising brokers and/or top executives of their real estate companies. *E.g.*, *United States v. Northside Realty Assocs.*, 474 F.2d 1164, 1168 (5th Cir. 1973); *Marr*, 503 F.2d at 742; *Northside*, 605 F.2d at 1354; *Fort v. White*, 1 EOHC Rptr. (Prentice Hall) ¶ 13,703 at 14,477, 14,480-81 (D. Conn. 1975), aff'd, 530 F.2d 1113 (2d Cir. 1976); *United States v. Robbins*, 1 EOHC (Prentice Hall) ¶ 13,655 at 14,264-66 (S.D. Fla. 1974); *Sanborn v. Wagner*, 354 F. Supp. 291, 295 (D. Md. 1973); *United States v. Mitchell*, 335 F. Supp. 1004, 1005-07 (N.D. Ga. 1971), aff'd sub nom. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826 (1973).

Throughout the entire history of the FHA, the only reported exception to the line of decisions holding top officers and owners of brokerage companies personally liable for the FHA violations of their firms' agents appears to be a 1983 district court decision, which declined to hold the president/co-owner of a large corporate realty firm liable along with his firm. *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F. Supp. 1232, 1303-05 (N.D. Ohio 1983), aff'd in part and rev'd in part on other grounds, 774 F.2d 135 (6th Cir. 1985), cert. denied, 475 U.S. 1019 (1986). The facts in *Heights*, however, do not specify whether the president was also his company's only

supervising broker, a pivotal fact giving rise to broker responsibility under state licensing law.[11]

The early decisions imposing vicarious liability on supervising brokers, including officer/brokers, occurred before, and were among those cited as the foundation for, HUD's first FHA regulation on vicarious liability. See 53 Fed. Reg. 24,184-85, 24,197 (June 27, 1988) (adopting final regulation, then codified at 24 C.F.R. § 105.13); 49 Fed. Reg. 40,528-29 (Oct. 16, 1984) (proposing this regulation and citing cases); see also Brief of the United States as *Amicus Curiae* ("U.S. Br.") 19 n.3 (citing same cases).

4. In passing the Fair Housing Amendments Act of 1988, Congress tacitly approved the interpretation of the Act in the early vicarious liability cases and HUD regulation. The early court decisions and the 1988 HUD regulation were in place before Congress passed the 1988 Fair Housing Amendments Act ("FHAA"), a set of substantial changes to the FHA whose major purposes included strengthening enforcement of the Act. See H.R. Rep. No. 100-711, 100th Cong., 2d Sess., 17, 33-40 (1988) (describing how the FHAA "strengthens the private enforcement section" as well as the administrative and Justice Department's enforcement provisions). The FHAA amounted to "tacit congressional approval" of these pre-FHAA decisions and the 1988 HUD regulation holding principals

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[11] *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1045 (N.D. Ohio 1998), cited by petitioner (Pet. Br. 16), dealt only with officers of a general corporation and had nothing to do with whether a licensed real estate broker should be held vicariously liable. Nor did *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975).

with the "right to control" their agents liable for those agents' FHA violations. See *Edelman v. Lynchburg College*, 535 U.S. ___, 122 S. Ct. 1145, 1151-52 (2002) (Title VII case); see also *id.* at 1152 ("By amending the law without repudiating the [EEOC] regulation, Congress suggests its consent" to the agency's practice); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982) (Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change). Also in the 1988 FHAA, Congress reaffirmed its particular concern for discriminatory practices by those who possess real estate licenses by enacting § 3612(g)(5), a provision ordering HUD to take certain actions with respect to persons holding licenses at the conclusion of an administrative proceeding, if it was determined that they had violated the Act, including "recommend[ing] to [the licensing] agency appropriate disciplinary action (including, where appropriate, the suspension or revocation of the license of the respondent)." 42 U.S.C. § 3612(g)(5)(B).

Since passage of the 1988 FHAA and HUD's reaffirmation of its 1988 regulation (see pp. 31-33, *infra*), the lower courts have continued to apply strong vicarious liability rules in FHA cases involving brokers, often relying on a defendant broker's "right to control" his salespersons and holding personally liable individuals who

were the supervising brokers, top officers, or sole owners of their real estate companies.[12]

5. HUD's regulations support holding Meyer vicariously liable under the Act. In holding Meyer vicariously liable for Crank's discrimination, the court of appeals properly relied on a HUD regulation in effect at the time of Crank's discrimination authorizing FHA administrative complaints

> "against any person who directs or controls, or has the right to direct or control, the conduct of another person . . . if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person [violates the Act]." *Former* 24 C.F.R. § 103.20(b) (1999).

See JA 60-61. HUD adopted this regulation on January 23, 1989 (54 Fed. Reg. 3232, 3293), after notice and comment, pursuant to explicit grants of rule-making authority in the FHA. See 42 U.S.C. § 3614a (original FHA); § 3601 notes (1988 FHAA).[13] Under *Chevron U.S.A. v. Natural Resources*, 467 U.S. at 843, such a regulation is to be followed so long as it is "a permissible construction of the statute."

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[12] See, *e.g.*, *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096-98 (7th Cir. 1992), cert. denied, 508 U.S. 972 (1993); *Sanders v. Dorris*, 873 F.2d 938, 944 (6th Cir. 1989); *Coleman v. Cranberry Baye Rental Agency*, 202 F.R.D. 106, 109-10 (N.D. N.Y. 2001).

[13] This 1989 regulation adopted the same "directs or controls, or has the right to direct or control" standard for FHA vicarious liability that HUD had set forth in an earlier regulation promulgated a few months before passage of the 1988 FHAA. See p. 29, *supra*.

Respondents agree with the United States as *amicus curiae* that this regulation is entitled to *Chevron* deference and that the 1999 revisions to that regulation were not substantive. U.S. Br. 20, 22. Respondents disagree, however, with the suggestion of the United States that the 1989 HUD regulation was merely designed to identify "*potentially* liable" FHA defendants "rather than articulating a test for determining *actual* liability." *Id.* 21 (emphasis in original). Such an interpretation conflicts with "HUD's contemporaneous explanation" (see *id.* 18), which cited as authority for the regulation decisions imposing *actual* liability on FHA defendants in both privately initiated and Justice Department cases. See 54 Fed. Reg. 3260.[14]

Finally, neither petitioner nor the United States discuss the import of HUD's regulation providing that "broker" or "agent"

> "includes any person authorized to perform an action on behalf of another person regarding any matter related to the sale or rental of dwellings, including offers, solicitations or contracts and the administration of matters regarding such offers, solicitations or contracts or any residential real estate-related transactions." 24 C.F.R. § 100.20 (2002), promulgated at the same time as 24 C.F.R. § 103.20. See 54 Fed. Reg. at 3283-84.

[14] Furthermore, HUD reinforced the view that its 1989 regulation meant to define a substantive FHA principle by stating in a rule-making proposal in 2000 that FHA vicarious liability "is fully consistent with the Department's position on a principal's liability for the acts of agents." 65 Fed. Reg. 67,667 (Nov. 13, 2000) (HUD's commentary on proposed sexual harassment rule).

Under this regulation, Crank would qualify as the agent and Meyer as the broker, based on their statutorily defined relationship under the state licensing law.

6. The "direct or control" standard for FHA vicarious liability has also been endorsed in decisions by HUD administrative law judges pursuant to their authority under 42 U.S.C. § 3612. In the years since the 1988 FHAA provided this authority, HUD ALJs have rendered a number of decisions holding individuals liable for the FHA violations of their company's employees.[15] This uniform set of HUD administrative decisions is entitled to substantial deference. See *United States v. Mead Corp.*, 533 U.S. 218, 228-31 (2001).

One example is *HUD v. Active Agency*, Fair Housing-Fair Lending Rptr. ¶ 25,141 at 26,157, 26,160 (HUD ALJ 1999), which held liable a corporation's owner (Peters) and its licensed real estate broker (Brady) for the discrimination of the company's agents. In rejecting these

[15] See, *e.g.*, *HUD v. Properties Unlimited*, Fair Housing-Fair Lending Rptr. ¶ 25,009 at 25,143, 25,154 (HUD ALJ 1991) (holding liable individual owner-manager, because, though his "involvement in the events which are the subject of this case was almost entirely passive . . . , he is responsible as a matter of law for his employees' unlawfully discriminatory conduct, even if he was unaware of, or did not explicitly ratify, that conduct. He clearly failed to fulfill his responsibility to ensure that his employees knew the law and obeyed it."); *HUD v. Murphy*, Fair Housing-Fair Lending Rptr. ¶ 25,002 at 25,019, 25,053 (HUD ALJ 1990) (holding liable president of corporate entities who was "responsible for [their] business operations"). The HUD ALJ fair housing decisions are reported in a loose-leaf reporter published by Aspen Law & Business entitled "Fair Housing-Fair Lending Reporter" at ¶¶ 25,001 *et seq.* and are also available on the internet at "http://www.hud.gov/alj/pdf".

individuals' claim that they should not be held responsible, the HUD ALJ wrote:

> "The relationship among the owner of Active Agency, the agency itself, its broker, and its sales agents is an agency relationship. . . . [Not to impose liability] would leave the broker and owner with little incentive to adequately manage and educate the employee agents or to ensure their work is free from discrimination. Respondent Brady was not only Active's broker, but he was the office manager. He authored the procedures manual which sets out the standard procedures and activities expected of Active's agents and other employees." *Id.* at 26,159-60 (case citations omitted).

Here, Meyer was *both* Triad's owner *and* its supervisory broker, each of which was a position held to have sufficient control for vicarious liability in the *Active Agency* case.

7. The broad construction required for the FHA supports holding Meyer vicariously liable here. Based on the relationship between Meyer and Crank as defined by real estate licensing law and on common-law principles, Meyer should be held vicariously liable for Crank's discrimination because he had a duty to control Crank's activities with respect to compliance with the FHA. That result – imposing FHA liability on a supervising officer/broker with the legal duty to control salespersons for discriminatory acts committed by those salespersons within the scope of their licensed activities – is also consistent with the primary objective of the FHA, which is to provide for fair housing throughout the United States. 42 U.S.C. § 3601.

Meyer's unwillingness to take responsibility for Crank's FHA violations undercuts the Act's primary goal of eliminating housing discrimination. To achieve that goal, the FHA requires that brokers, regardless of their business form, who have the same power to control that Meyer had over Crank, must exercise that power in favor of fair housing. As the FHA's legislative history makes clear, Congress intended the Act to apply broadly with no loopholes enabling persons and businesses to exempt themselves from coverage by changing the form in which they do business or hold property. See pp. 25-27, *supra*.

Over 85% of California real estate brokers use a non-corporate business form in which they are clearly liable for their salespersons' FHA violations under basic agency principles. See p. 15, *supra*; CAR Br. 7. For the other 14%, California, like other states, requires the corporate licensee to designate an individual broker who is responsible for the conduct of the firm's salespersons. See pp. 16-18, *supra*. To hold that Meyer, as Crank's supervising broker, is responsible for Crank's discrimination would thus do no more than equate Meyer's responsibilities with those of the vast majority of his fellow brokers, hardly a result that would require "restructuring of the real estate industry" (CAR Br. 13) or be a "catastrophic" event "open[ing] the floodgates of litigation throughout the country." Pet. Br. 32.

If by simply changing form from an individually licensed broker to an officer/broker, a licensed real estate broker can shield himself from FHA liability for discrimination committed by salespersons operating under his supervision, Congress' purpose will be frustrated. While only 14% of the brokers in California currently do business in the corporate form, a rule that allows the corporate veil

to trump FHA liability would give every broker a reason to incorporate and would insulate a major sector of the housing industry that Congress voiced its intent to reach with the Act.

II. UNDER COMMON-LAW PRINCIPLES, MEYER IS LIABLE AS THE LICENSEE UNDER WHOSE LICENSE CRANK ACTED.

Apart from whether Meyer and Crank are considered to have a principal-agent relationship or whether Meyer may be vicariously liable for Crank's discrimination, a distinct and well-established source of liability is recognized in the Restatement when the underlying activity could only occur with a license issued by the government. In such cases, if the person who obtained the license in turn permits another to engage in that activity, the licensee is liable for the other's torts committed under that license. Under these circumstances, common-law principles hold liable the individual broker who obtained the license in question:

> "When a license is required for the performance of acts, one having a license who delegates performance of the acts to another is subject to liability for the negligence of the other." Restatement § 214, cmt. *b*.

Accord Seavey, *supra*, § 82, at 137, 139: "A person whether or not a principal, . . . who operates under a license is responsible for the negligent acts of those to whom he delegates performance and who can lawfully act only because of the license." This rule has long been recognized by this Court. See, *e.g.*, *Chicago, Burlington and Quincy RR. v. Willard*, 220 U.S. 413, 421-24 (1911); *Railroad*

Company v. Barron, 5 Wall. (72 U.S.) 90, 104 & nn.14, 15 (1866).

As the designated officer/broker, Meyer is the "licensee" for purposes of applying the common-law principles embodied in Restatement § 214, since in California, as elsewhere, a license is issued in reliance on the individual broker's knowledge, experience, and qualifications, not on those of the corporation. This conclusion is based on the licensing law itself.

California law establishes a number of requirements that must be met before *any* "applicant" can obtain a broker's license. They include: (1) having two years of experience as a real estate salesperson, who by definition must be a "natural" person; (2) being at least 18 years of age; (3) completing a specified set of college-level courses related to real estate; and (4) passing a written examination. B&P Code §§ 10132, 10150, 10150.6, 10153.2, 10153.3; Cal. Code Reg., tit. 10, § 2720. Once a broker's license has been issued, it can only be renewed if the individual making the application has successfully completed certain continuing education courses, evidence of which must be submitted with the renewal application. B&P Code §§ 10170.5, 10171.5.[16] A corporation cannot do any of these things.

The fact that Triad was permitted to practice real estate under Meyer's designated broker's license did not

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[16] In fact, in 1986, Meyer's corporate officer renewal application was denied because the state was unable to determine that he had completed required continuing educati[illegible]AL 105. His license was issued after he submitted the necessary [illegible]AL 100-102.

alter Meyer's responsibilities as the licensee under the Restatement. It was Meyer's qualifications, not Triad's, on which the state continually relied in permitting Triad to sell real estate. Once Meyer himself met those requirements, the decision whether Triad would, as a consequence, be permitted to engage in real estate activities was entirely up to Meyer. Indeed, when Meyer in 1972 initially qualified to be a broker, he elected to have that license issued to him as an individual (JAL 3, 15), and only later asked that it be issued in a form that allowed Triad to do business. JAL 14. Meyer was free at any time to ask that the broker's license for which he was qualified instead be issued to him as an individual, rather than to him as an officer of Triad, a change that would have immediately stripped Triad of its authority to engage in real estate brokerage.[17] If Meyer and Triad had parted ways, only Meyer would still have been qualified to be a broker. Cal. Code Reg., tit. 10, § 2740. Simply put, Triad as a corporation may have perpetual existence as a business entity, but it does not have perpetual existence as a real estate broker unless affiliated with a qualified officer/broker.

Thus, even though Crank may have been an employee of Triad, it was *Meyer's* qualifications as a broker, and his

[17] The record shows that it was Meyer as a designated broker, not Triad as a corporation, that the California DRE licensed and held responsible as the broker: Authorization for Triad required "signature of licensed broker-officer" (JAL 14); renewal forms entitled "officer renewal application," required signature of designated broker as "applicant" (JAL 6-7, 36-37, 44-45, 48-49, 100-101, 108-09, 112-13); officer renewal forms referred to officer as licensee and subject to real estate law (JAL 6-7, 48-49); license itself issued to Meyer as "officer," not Triad as corporation, bearing the limitation: "valid only as officer of Triad, Inc." JAL 8, JA 37 at ¶ 4; JA 40 at ¶ 4.

personal assent, that put Crank in the position where he could injure respondents. Under Restatement § 214, cmt. b, that is enough to hold Meyer liable for Crank's unlawful conduct under Meyer's license.

A factually related common-law principle also applicable in this case imposes liability on a principal for the acts of an agent, whether or not a servant, "if the agent's position enabled him to commit the tort." Seavey, *supra*, at § 91, p. 161. Under Restatement § 261:

> "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."

By agreeing to allow Crank to operate under the broker's license, Meyer enabled him to commit his acts of fraud and misrepresentation – his FHA violations – against the Holleys. For this, too, Meyer is subject to FHA liability.

III. UNDER COMMON-LAW PRINCIPLES, MEYER IS LIABLE FOR HIS NEGLIGENT SUPERVISION AND FAILURE TO CONTROL THE ACTIVITIES OF CRANK.

Petitioner argues that under common-law principles he cannot be liable for Crank's discrimination in his position as president of Triad because he did not participate in the discrimination. Pet. Br. 14-15. That argument ignores another well-established common-law principle – that a corporate officer is personally liable "where the corporation owed a duty of care to [an injured] person, the duty had been delegated to the officer, and the officer breached this duty through personal fault causing injury."

3A *Fletcher Cyclopedia of the Law of Private Corporations*, § 1137, at 303 (perm. ed. 1994). Here, a special duty of care was imposed on Meyer as Triad's only designated officer/broker to supervise and control the corporation's licensed activities, a duty he breached through his own negligence.

Triad, and Meyer as its designated officer/broker, owed fiduciary duties to all parties in a contemplated real estate transaction. *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 783, 598 P.2d 45 (1979); *Nguyen v. Scott*, 206 Cal.App.3d 725, 735-36, 253 Cal.Rptr. 800 (1989). See generally Rohan, *supra*, ch. 3 (discussing broker's duties in the various states). While those duties may nominally have been imposed on Triad, it fell to Meyer, as the designated officer/broker, to ensure the corporation's compliance with those duties. B&P Code § 10159.2.

Meyer may not interpose Triad's corporate veil to shirk those duties. When a corporation as an entity is placed in a fiduciary capacity, "it is the corporate officer who is charged with living up to the terms of the agency." *In re Hildebrand*, 230 B.R. 72, 77 (Bankr. D. Md. 1999); cf. *Middlesex Insur. Co. v. Mann*, 124 Cal.App.3d 558, 561-62, 571-74, 177 Cal.Rptr. 495 (1981) (where defendant was the individual "through whom" insurance company was licensed to do business, he was liable for breach of fiduciary duty owed by company). Otherwise, a corporate officer always could place the corporation between himself and the person to whom the duty was owed in order to escape liability. *Hildebrand, supra*.

Meyer repeatedly breached his duties as the designated broker and as the individual charged with living up to the statutory duties imposed on Triad. Over the course

of the 1995-1998 period, Meyer admitted: (1) that he did not personally supervise Triad's salespersons (JAL 134-37); (2) that he "fulfilled [his] duties" as designated officer/broker and president of Triad "through [Crank]" (JAL 136); (3) that Crank "undertook day-to-day operations" of Triad, which Meyer "continued to monitor . . . through him" by meeting with him "from time to time" (JAL 135); (4) that Meyer's supervision consisted of sitting down with Crank, on an estimated monthly basis, with no formal agenda and asking "How are things going?" (JAL 138); (5) that he did not review any Triad paperwork on finalized real estate transactions because he had delegated that work to Crank, even though he provided no training to Crank for handling this responsibility (JAL 143); (6) that he did not routinely review any documents to monitor the course or quality of Crank's work (JAL 143-144); (7) that he "would come to the office on some occasion, sometimes weekly, sometimes monthly, sometimes a couple of times a month" and discuss with his "former colleagues" how they were doing (JAL 139); (8) that he had attended "a couple" of the periodic meetings of Triad salespersons (JAL 143); (9) that he had never worked with or reviewed any of the work of Stump, another Triad agent involved in this case (JAL 159); (10) that he did not know without having to ask Crank on the day before his deposition whether the Triad agents had been given the company's policies and procedures manual (JAL 158); and (11) that he never provided any training regarding the fair housing laws to Triad salespersons nor does he recall any fair housing training occurring at Triad. JAL 144.[18]

[18] Meyer also claimed that he had never heard Crank, an agent he had supervised for over 15 years, use the phrase "salt and pepper team"

(Continued on following page)

Triad's corporate veil does not shield Meyer from liability because of the unique fiduciary responsibilities imposed on him alone as the designated officer/broker of the corporation. The common law recognizes that certain duties and obligations are personal:

> "Duties or privileges created by statute may be imposed or conferred upon a person to be performed or exercised personally only. Whether a statute is to be so interpreted depends upon whether or not in view of the purposes of the statute, the knowledge, consent, or judgment of the particular individual is required." Restatement § 17, cmt. *b*.

Modern courts have found nondelegable duties arising from licensing statutes, rules and regulations.[19] Indeed, at least 15 states have specific prohibitions against "license lending" or allowing a salesperson to operate a brokerge

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to describe interracial couples. JAL 60-74, 160. Meyer was unaware that Crank had admitted that it was a term he used. JA 46-47, Meyer Depo. 32.

[19] *E.g.*, *Chapman v. Mutual Service Casualty Insurance Co.*, 35 F. Supp. 2d 699, 706-07 (E.D. Wis. 1999) (broker's duties toward seller and buyers imposed by state real estate law are nondelegable as a matter of public policy). See also, *e.g.*, *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 125 (1989) (former Fed.R.Civ.P. 11 established nondelegable duty on individual attorney signing pleading); *MBH Commodity Advisors, Inc. v. Commodity Futures Trading Commission*, 250 F.3d 1052, 1066-67 (7th Cir. 2001) (licensed commodity futures trader has nondelegable duty to comply with rules of futures association); *Cosmopolitan Broadcasting Corp. v. Federal Communications Commission*, 581 F.2d 917, 921-22 (D.C. Cir. 1978) (radio station licensees have a nondelegable duty to independently choose all programming); *Rob-Mac, Inc. v. Department of Motor Vehicles*, 148 Cal.App.3d 793, 798-99, 196 Cal. Rptr. 398 (1983) (statutory duties imposed on licensed vehicle dealer are nondelegable).

office without a broker's presence. See state law citations, Resp. App. 10. This type of nondelegable duty is not an obligation grounded in the FHA. In fact, this case does not even raise the issue whether the FHA itself imposes a nondelegable duty not to discriminate.[20] Instead, the nondelegable nature of Meyer's duties arises out of the law of California. See, *e.g.*, B & P Code § 10159.2; Cal. Code Reg., tit. 10, § 2725.

For more than a century, corporate officers have been held personally liable for negligently violating their statutory duties. If "statutory duties to manage [c]ould be sufficiently performed by *absence*," the untenable situation would develop where "the denser the ignorance" the more certain would be exoneration from liability. *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 56 P. 358, 360 (Mont. 1899) (emphasis added), noted in 3A *Fletcher Cyclopedia of Corporations*, *supra*, § 1137, at 303. Here, Meyer was charged with certain personal duties as a

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[20] The nondelegable duty doctrine is one way of making a principal liable for the torts of his agents who were acting outside the scope of their employment and for the torts of independent contractors. See Restatement § 219(2)(c)(quoted in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758 (1998)); *General Building*, 458 U.S. at 395-96 and n.20 (relying on and quoting Restatement § 214). Since Crank violated the FHA while acting within the scope, as petitioner concedes (Pet. Br. 2, 4 (describing Crank as acting as Triad's agent when he dealt with the respondents)), the court of appeals' decision holding his master vicariously liable need not have mentioned whether brokers have a nondelegable duty to obey the FHA. See, *e.g.*, *Cabrera v. Jakabovitz*, 24 F.3d 372, 388 n.16 (2nd Cir.), cert. denied, 513 U.S. 876 (1994) (where principal-landlords are liable for their agent's discrimination "under traditional doctrines of *respondeat superior*, we do not need to consider whether they might also be liable because landlords may have a nondelegable duty not to discriminate").

corporate officer, arising out of the state licensing law and Triad's fiduciary obligations, and his failure to discharge those duties through "absence" or otherwise was a wrongful act in itself. Cf. Restatement (Second) of Torts, § 284 (1965) ("[n]egligent conduct may be . . . a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do"); *id.* § 874 ("[o]ne standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation").

In sum, as Meyer admitted, he had "not been involved in the day-to-day management of the business since February 1995" (JAL 151), despite his recognition that he was, as Triad's president and designated officer/broker, "ultimately responsibl[e] for the activities of that organization." JAL 145. If Meyer is allowed to fulfill his statutory duties as a licensed officer/broker through absence, then the objectives of the FHA to stop housing discrimination will be frustrated.[21]

[21] Even if Meyer was acting only as Crank's "fellow agent," rather than his principal, common-law principles regarding the liability of agents for the torts of their fellow agents support liability. Where an agent has no power to bind the principal by the appointment of a subagent, then the agent is responsible to third persons for the subagent's conduct. Restatement § 5, cmt. *b*. Because Meyer had no power to completely delegate all his duties to Crank, see pp. 42-43, *supra*, he is liable to third persons for the conduct of Crank in the same way "as that of a master or other principal for the conduct of his servants and other agents." Restatement § 362. Meyer's wrongful delegation of his duties to Crank also renders him liable under common-law principles – and therefore the FHA – for Crank's conduct, because Meyer was "at fault in appointing" Crank. Restatement § 358.

IV. COMMON-LAW "VEIL PIERCING" PRINCIPLES AND THE "ALTER EGO" DOCTRINE, ADAPTED TO THE FHA'S POLICIES, RENDER MEYER PERSONALLY RESPONSIBLE FOR TRIAD'S LIABILITY.

Meyer's treatment of Triad was so informal and the underfunding of the corporation so severe that he should be held liable for Triad's FHA obligations based simply on traditional concepts of "piercing the corporate veil" and the "alter ego" doctrine. In *United States v. Bestfoods*, 524 U.S. 51, 62 (1998), this Court held that a "fundamental" common-law principle is that "the corporate veil may be pierced and the shareholder held liable for the corporation's conduct" in certain situations.

Meyer was Triad's founder and sole stockholder, its president, and its designated broker. In this combination of roles, Meyer established all of Triad's policies. JA 46-47, Meyer Depo. 38-39. He must also be considered responsible for Triad's finances, which were so thin that Triad cannot pay any judgment in this case, and for its insurance, which specifically excluded discrimination claims.[22]

[22] This was a calculated gamble by Meyer. An officer/broker can ensure that his corporation has adequate levels of errors and omissions insurance ("E&O"). See, *e.g.*, Jacobus, *supra*, at 450 ("[t]oday E&O is simply a cost of the real estate business just like rent, telephone, and automobile expenses"). Triad did have an E&O policy, but it explicitly excluded racial discrimination claims. See JA 27, 50; Record 43 at 40-41; Resp. C.A. Ex. R. 220-28; district court opinion in case 98-8617, lodged with the Clerk of Court by respondents. It is clear that insurance covering vicarious liability for civil rights violations is available. See, *e.g.*, *Melugin v. Zurich Canada*, 50 Cal.App.4th 658, 666-67, 57 Cal.Rptr.2d 781 (1996); *Dart Industries, Inc. v. Liberty Mut. Ins. Co.*, 484 F.2d 1295, 1297-98 (9th Cir. 1973).

Record at JA 27, 50; Record 43 at 40-41. As Triad's designated broker, he was legally responsible for supervising Triad's salespersons and had control over Triad's ability to be a real estate brokerage firm. See pp. 37-38, *supra*. Despite these responsibilities, Meyer failed to observe basic corporate formalities. Examples of such conduct include: (1) no apparent shareholder or board meetings between March 4, 1996, and August 5, 1998, in violation of Cal. Corp. Code §§ 301, 600(b) (West 1990); and (2) no documentation of the purported "transfer" of the entire company to Crank one day in 1995, nor of any notice to or approval by Triad's board or shareholders of such a transfer, in violation of Cal. Corp. Code § 1001(a). JAL 55, 124.

Meyer's failures support veil piercing here. See *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) (inadequacy of capital "has frequently been an important factor in cases denying stockholders their defense of limited liability"); 1 *Fletcher Cyclopedia*, § 41.10, at 586 (rev. ed. 1999) ("inadequate capitalization" and "whether the formal legal requirements of the corporation are observed" are among the "common factors" that courts "consider when determining whether to pierce the corporate veil"); *id.* § 41.30, at 625-28 (same).

In determining whether to pierce the veil, the Court should "look closely at the purpose of" the FHA. 1 *Fletcher Cyclopedia*, *supra*, § 41.90, at 698; see also Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853, 859-64, 871 (1982) (willingness to pierce the veil should turn on the policies of the particular federal statute involved). "Under federal common law, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." 1 *Fletcher Cyclopedia*, *supra*,

§ 41.90, at 698-99. The "interposition of [Triad's corporate veil should] not be allowed to defeat [the] legislative policy" of the FHA against housing discrimination and the long-standing judicial determination that brokers are responsible for their agents' FHA violations. See *Anderson*, 321 U.S. at 363.

CONCLUSION

The judgment of the court of appeals should be affirmed and Meyer held liable for Crank's FHA violations in his role as Triad's licensed officer/broker. With respect to Meyer's negligent supervision and the propriety of piercing the corporate veil, this Court should affirm the judgment of the court of appeals and remand for trial on those issues.

Respectfully submitted,

ROBERT G. SCHWEMM
College of Law, Room 209
University of Kentucky
Lexington, Kentucky 40506
(859) 257-6013

BRANCART & BRANCART
ELIZABETH BRANCART
Counsel of Record
CHRISTOPHER BRANCART
Post Office Box 686
Pescadero, California 94060
(650) 879-0141

LAW OFFICE OF
GREG ALEXANIAN
GREG ALEXANIAN
10154 Riverside Drive
Toluca Lake, California 91602
(818) 760-3386

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RESPONDENT'S APPENDIX

Collection of Citations of State Real Estate Licensing Laws

39 states and the District of Columbia permit issuance of a broker's license to a corporation:

Ala. Code § 34-27-32 (1997)

Ariz. Rev. Stat. Ann. § 32-2125(A) (West 2002)

Cal. Bus. & Prof. Code § 10158 (West 1987)

Colo. Rev. Stat. § 12-61-103(7) (2001)

Conn. Gen. Stat. Ann. § 20-312(b) (West 1999)

D.C. Code § 47-2853.183 (West 2001)

Ga. Code Ann. § 84-1414(a) (Harrison Supp. 1999); Ga. Code Ann. § 43-40-10(a) (2002)

Haw. Rev. Stat. § 467-8(5) (Cum. Supp. 2000)

Idaho Code § 54-2016(1)(a) (Michie Supp. 2001)

Ill. Comp. Stat. Ann. 454/5-15(b) (West Supp. 2002)

Ind. Code Ann. § 25-34.1-3-4.1(c) (West 2001)

Iowa Code Ann. § 543B.2 (1997)

La. Rev. Stat. Ann. § 37:1437.2(A) (2000)

Me. Rev. Stat. Ann. tit. 32, § 13173(1) (West 1999)

Md. Code Ann., Bus. Occ. & Prof. § 17-321(a) (2000)

Mass. Gen. Laws Ann. ch. 112, § 87UU (West 1996)

Mich. Comp. Laws § 339.2505(1) (2001)

Minn. Stat. Ann. § 82.20(4) (West 1999)

Miss. Code Ann. § 73-35-6 (2000)

Mo. Ann. Stat. § 339.030 (West 2001)

Nev. Rev. Stat. Ann. § 645.380 (Michie 2000)

N.H. Rev. Stat. Ann. § 331-A:12(IV) (1995)

N.J. Stat. Ann. § 45:15-9 (West 1993)

N.M. Stat. Ann. § 61-29-9(D) (Michie 1999)

N.Y. Real Prop. Law § 440 (1998)

N.C. Gen. Stat. § 93A-2(a) & -4(a) (2002); N.C. Admin. Code tit. 22, r. 58A.0502 (2002)

N.D. Cent. Code § 43-23-05 (1993)

Ohio Rev. Code Ann. § 4735.02 (Anderson 2002 Supp. Pamph.); Ohio Admin. Code § 1301:5-1-03 (2002)

Okla. Stat. tit. 59, § 858-305 (2000); Okla. Real Estate Comm. Rules, r. 605:10-1-2(a) (2002)

Pa. Stat. Ann., tit. 63, § 455.513 (1996)

R.I. Gen. Laws sec. 5-20.5-8 (1999)

S.D. Codified Laws § 36-21A-38 (Michie 2000)

Tenn. Code Ann. § 62-13-102(3)(A) & (12) (2002)

Tex. Rev. Civ. Stat. § 6573a, subsection 6(c) (2002)

Utah Code Ann. § 61-2-9(4) (2000)

Vt. Stat. Ann. Tit. 26, § 2211(2) & (4) & § 2291 (1998)

Va. Code Ann. § 54.1-2100 (Michie 2002)

Wash. Rev. Code § 18.85.170(1) (1999)

W. Va. Code § 30-40-12(b) (2002); W. Va. Code St. R. § 174-1-4.2 (2000)

Wis. Stat. § 452.12(2) (2001 Cum. Supp.)

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29 states and the District of Columbia require the designated officer to be individually licensed:

Ariz. Rev. Stat. Ann. § 32-2125(A) (West 2002)

Conn. Gen. Stat. Ann. § 20-312(b) (West 1999)

D.C. Code § 47-2853.183 (West 2001)

Ga. Code Ann. § 84-1414(a) (Harrison Supp. 1999); Ga. Code Ann. § 43-40-10(a) (2002)

Haw. Rev. Stat. § 467-8(5) (Cum. Supp. 2000)

Idaho Code § 54-2016(1)(b) (Michie Supp. 2001)

Ill. Comp. Stat. Ann. 454/5-15(b) (West Supp. 2002)

Ind. Code Ann. §§ 25-34.1-3-4.1(c) & 24-34.1-4-2 (West 2001)

Iowa Code Ann. § 543B.2 (1997)

La. Rev. Stat. Ann. § 37:1437.2(B) (2000)

Me. Rev. Stat. Ann. tit. 32, § 13173(1) (West 1999)

Md. Code Ann., Bus. Occ. & Prof. § 17-321(b) (2000)

Mass. Gen. Laws Ann. ch. 112, § 87UU (West 1996)

Mich. Comp. Laws § 339.2508(1) & (2) (2001)

Minn. Stat. Ann. § 82.20(4) (West 1999)

Miss. Code Ann. § 73-35-6 (2000)

Mo. Ann. Stat. § 339.030 (West 2001)

N.H. Rev. Stat. Ann. § 331-A:16(III) (Supp. 2001)

N.J. Stat. Ann. § 45:15-9 (West 1993)

N.M. Stat. Ann. § 61-29-9(D) (Michie 1999)

N.Y. Real Prop. Law § 441-b(2) (1993)

N.C. Gen. Stat. § 93A-2(a)(1) (2002); N.C. Admin. Code tit. 22, r. 58A.0503(g) (2002)

N.D. Cent. Code § 43-23-05 (1993)

Ohio Rev. Code Ann. § 4735.02 (Anderson 2002 Supp. Pamph.)

Okla. Stat. tit. 59, § 858-305 (2000); Okla. Real Estate Comm. Rules, r. 605:10-7-8 (2002)

Pa. Stat. Ann., tit. 63, § 455.513 (1996); 49 Pa. Code § 35.222(c) (2002)

Tex. Rev. Civ. Stat. § 6573a, subsection 6(c) (2002)

Va. Code Ann. § 54.1-2106.1(A) (Michie 2002)

W. Va. Code § 30-40-12(c) (2002)

Wis. Stat. §§ 452.01(3j) & (3k), 452.12(2) (2001 Cum. Supp.)

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9 states allow the designated officer to do business under the corporation's license:

Ala. Code § 34-27-2(a)(12) & -32(e) (1997)

Cal. Bus. & Prof. Code § 10211 (West 1987)

Colo. Rev. Stat. § 12-61-103(7) (2001)

Nev. Rev. Stat. Ann. § 645.380 (Michie 2000)

R.I. Gen. Laws sec. 5-20.5-8 (1999)

S.D. Codified Laws § 36-21A-38 (Michie 2000)

Utah Code Ann. § 61-2-9(4) (2000)

Vt. Stat. Ann. Tit. 26, § 2291 (1998)

Wash. Rev. Code § 18.85.170(1) (1999)

Every state allowing a corporation to hold a broker's license requires that the corporation designate a licensed broker or otherwise qualified broker as broker, and virtually every one of those states explicitly imposes duties of responsibility and/or supervision on that broker for the acts of the corporation and/or its salespersons for which a license is required:

Ala. Code §§ 34-27-2(a)(12), -32(e) & -34(a)(1) & (2) (1997)

Ariz. Rev. Stat. Ann. § 32-2125(A) & 32-2153(A)(21) (West 2002); Ariz. Admin. Code R4-28-302(H) (2002)

Cal. Bus. & Prof. Code § 10159.2 & 10211 (West 1987)

Colo. Rev. Stat. §§ 12-61-103(7) & 12-61-103(8) (2001)

Conn. Gen. Stat. Ann. § 20-312(b) (West 1999)

D.C. Code § 47-2853.161 (West 2001)

Ga. Code Ann. § 84-1414(a) (Harrison Supp. 1999); Ga. Code Ann. § 43-40-10(a), -18(b) & (c) (2002)

Haw. Rev. Stat. § 467-8(5) (Cum. Supp. 2000); 16 Haw. Admin. Rules, ch. 99, § 16-99-3(m) (2002)

Idaho Code § 54-2038 (Michie 2000)

Ill. Admin. Code tit. 68, §§ 1450.10 & 1450.130 (2002)

Ind. Code Ann. §§ 25-34.1-3-4.1(c) & 25-34.1-4-2 (West 2001); Ind. Admin. Code tit. 876, r. 1-1-3(i), -11, -18 (2002)

Iowa Code Ann. § 543B.62(3)(b) (1997); Iowa Admin. Code R. 193E-2.1, -18.2(8), -18.14(5)(m) (2002)

La. Rev. Stat. Ann. § 37:1437.2(B) (2000)

Me. Rev. Stat. Ann. tit. 32, §§ 13067(I) & 13179 (West 1999)

Md. Code Ann., Bus. Occ. & Prof. § 17-321(b) (2000); Md. Regs. Code 09.11.05.02 (2002)

Mass. Regs. Code tit. 254, § 2.00(11) (2002)

Mich. Admin. Code r. 339.22310 & 339.22325 (2002)

Minn. Stat. Ann. § 82.20(5) (West 1999)

Miss. Code Ann. §§ 73-35-6 & -15(2) (2000); Miss. Real Estate Comm. Rule IV (A)(1) & (2) (2002)

Mo. Code Regs. Ann. tit. 4, § 250-8.020(1) (2002)

Nev. Admin. Code ch. 645, § 600 (2002)

N.H. Rev. Stat. Ann. § 331-A:12(IV), :16(l) & (ll) (Supp. 2001)

N.J. Stat. Ann. § 45:15-9 (2002); N.J. Admin. Code, tit. 11, § 5-4.2 (2002)

N.M. Stat. Ann. § 61-29-9(D) (Michie 1999); N.M. Admin. Code tit. 16, § 61.16.1.7 (JJ) & 61.16.9 (2002)

N.Y. Real Prop. Law § 441-b(2) (1998); N.Y. Comp. Codes R. & Regs. tit. 19, § 175.21(a) (2002)

N.C. Admin. Code tit. 21, r. 58A.0503(g), .0506(c) (2002)

N.D. Admin. Code §70-02-01-04, -09, -14 (2002)

Ohio Rev. Code Ann. § 4735.51(K) (Anderson 1998)

Okla. Stat. tit. 59, § 858-312(8) (2002 Cum. Supp.); Okla. Real Estate Comm. Rules, r. 605:10-7-8, :10-7-8(b) & :10-17-4 (2002)

Pa. Stat. Ann., tit. 63, § 455.513 (1996); 49 Pa. Code § 35.201 & .222(c) (2002)

R.I. Gen. Laws sec. 5-20.5-8 (1999); R.I. Dept. of Bus. Reg. Commercial Licensing Reg. 11, r. 2 & 15(E) (2002)

S.D. Codified Laws § 36-21A-38, -79 (Michie 2002); S.D. Admin. R. 20:69:03:16 (2002)

Tenn. Code Ann. § 62-13-312(15) (2002); Tenn. Comp. R. & Regs. 1260-2.01 (2002)

Tx. Rev. Civil. Stat. § 6573a, subsection 1(c) (2002)

Utah Code Ann. § 61-2-11(14) (2000); Utah Admin. Rules, R162-6.2.9 (2002)

Vt. Code R. 04 030 290 §§ 1.8(4) & (16), 2.6, 4.2 (2002)

Va. Code Ann. § 54.1-2106.1(A), -2142(D) (Michie 2002); 18 Va. Admin. Code § 135-20-10 (2002)

Wash. Rev. Code § 18.85.155 18.85.230(25) (1999); Wash. Admin. Code § 308-124-021(1) & -124D-061(2) (2000)

W. Va. Code §§ 30-40-4(f), -12(b) & (c), -17(b)(1), -19(a)(30) (2002)

Wis. Stat. § 452.12(3)(a) (date); Wis. Admin. Code § RL 17.09(1) (2002)

The majority of states and the District of Columbia specifically prohibit licensees from engaging in, or authorize discipline for, acts of housing discrimination:

Alaska Admin. Code tit. 12, § 64.130(19) (2002)

Ariz. Rev. Stat. Ann. § 32-2153(A)(19) (West 2002)

Cal. Code Regs., tit. 10, § 2780 (2002)

Colo. Rev. Stat. §§ 12-61-113(1)(m.5) (2001)

Conn. Agencies Regs. § 20-328-4a (2002)

Del. Real Estate Comm. Rule 10.3.1.1 & 10.3.1.2 (2002)

D.C. Code § 47-2853.191(a)(5) & .192(a)(5) (West 2001)

Ga. Code Ann. § 84-1421(a)(1) (Harrison Supp. 1999; Ga. Code Ann. § 43-40-25(a)(1) (2002)

Ill. Comp. Stat. Ann. 454/20-20(h)(21) & 20-50 (West Supp. 2002); Ill. Admin. Code tit. 68, § 1450.135 (2002)

Ind. Admin. Code tit. 876, r. 1-1-40(17) (2002)

Kan. Stat. Ann. § 58-3050(a)(3) (1994)

Ky. Rev. Stat. Ann. § 324.160(4)(v) & (5) (Michie 2001)

La. Rev. Stat. Ann. § 37:1455(A)(1) & :1437(D) (West 2000)

Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(16) (Supp. 2001)

Mass. Gen. Laws Ann. ch. 112, § 87AAA(k) (West 1996); Mass. Regs. Code tit. 254, § 3.00(14)(c) (2002)

Mo. Code Regs. Ann. tit. 4, § 250-8.070(5) (2002)

Neb. Rev. Stat. § 81-885.24(1) & (30) (Supp. 2002)

N.H. Rev. Stat. Ann. § 331-A:26(XVII) (Supp. 2001)

N.C. Gen. Stat. § 93A-6(a)(10) (2002); N.C. Admin. Code tit. 21, r. 58A.1601 (2002)

N.D. Cent. Code § 43-23-11.1 (1991)

Ohio Rev. Code Ann. § 4735.18 (A)(7) & .62(E) (Anderson 1998 & 2002 Cum. Supp.)

Okla. Stat. tit. 59, § 858-312(17) (2002 Cum. Supp.)

R.I. Gen. Laws sec. 5-20.5-14 (32) (1999); R.I. Dept. of Bus. Reg. Commercial Licensing Reg. 11, r. 21 (2002)

S.C. Code Ann. § 40-57-137(B)(6), (C)(5) & (H)(5) (Law Co-op 2001)

S.D. Codified Laws § 36-21A-71(10) (Michie 2000)

Tenn. Code Ann. § 62-13-312(13) (2002)

Tex. Rev. Civ. Stat. § 6573a, subsection 15(a)(6)(AA) (2002)

Vt. Stat. Ann. Tit. 26, § 2296(a) & Tit. 3, § 129a(a)(6) (2001 Cum. Supp.)

18 Va. Admin. Code § 135-20-260(7) (2002)

Wash. Rev. Code § 18.85.230(18) (2002 Cum. Supp.); Wash. Admin. Code § 308-124D-070 (2002)

W. Va. Code § 30-40-19(a)(27) (2002)

Wis. Stat. § 452.14(3)(jm) & (n) (1998); Wis. Admin. Code § RL 24.03(1) (2002)

A number of states explicitly prohibit "license lending" or similar conduct:

Alaska Admin. Code tit. 12, § 64.130(17) (2002)

Ariz. Admin. Code R4-28-302(J) (2002)

Haw. Rev. Stat. § 467-14(10) (Cum. Supp. 2000)

Ill. Admin. Code tit. 68, § 1450.220(j) (2002)

Kan. Stat. Ann. § 58-3062(e)(4) (1994)

La. Rev. Stat. Ann. § 37:1455(A)(19) (2000)

Mich. Admin. Code r. 339.22325 (2002)

Mo. Code Regs. Ann. tit. 4, § 250-8.020(2)(b) (2002)

Ohio Admin. Code § 1301:5-1-14(A) & (B) (2002)

Okla. Real Estate Comm. Rules, r. 605:10-17-4(6) (2002)

Or. Admin. R. 863-015-0140(2) (2002)

R.I. Dept. of Bus. Reg. Comm. Licensing Reg. 11, r. 12 (2002)

S.D. Codified Laws § 36-21A-71(25) (Michie 2000)

Wash. Admin. Code § 308-124D-061(1) (2002)

Wyo. Real Estate Comm. R. & Regs. § 13(a)(x) (2002)

Title 42, United States Code:

§ 3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

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§ 3603. Effective dates of certain prohibitions

. . .

(b) Exemptions

Nothing in section 3604 of this title (other than subsection (c)) shall apply to –

(1) any single-family house sold or rented by an owner: *Provided*, That such private individual owner does not own more than three such single-family houses at any one time: *Provided further*, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period:

Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: *Provided further*, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the

application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

. . . .

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§ 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

. . . .

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§ 3605. Discrimination in residential real estate-related transactions

(a) In general

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) "Residential real estate-related transaction" defined

As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance –

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

(c) Appraisal exemption

Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

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§ 3608. Administration

(a) Authority and responsibility

The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

. . . .

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§ 3610. Administrative enforcement; preliminary matters

(a) Complaints and answers

(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice

has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

(ii) Such complaints shall be in writing and shall contain such information and be in such form as the Secretary requires.

(iii) The Secretary may also investigate housing practices to determine whether a complaint should be brought under this section.

(B) Upon the filing of such a complaint –

(i) the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this subchapter;

(ii) the Secretary shall, not later than 10 days after such filing or the identification of an additional respondent under paragraph (2), serve on the respondent a notice identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this subchapter, together with a copy of the original complaint;

(iii) each respondent may file, not later than 10 days after receipt of notice from the Secretary, an answer to such complaint; and

(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint,

within 100 days after the commencement of such further action), unless it is impracticable to do so.

. . . .

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§ 3612. Enforcement by Secretary

(a) Election of judicial determination

When a charge is filed under section 3610 of this title, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (o) of this section in lieu of a hearing under subsection (b) of this section. The election must be made not later than 20 days after the receipt by the electing person of service under section 3610(h) of this title or, in the case of the Secretary, not later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates.

(b) Administrative law judge hearing in absence of election

If an election is not made under subsection (a) of this section with respect to a charge filed under section 3610 of this title, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge issued under section 3610 of this title. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under section 3105 of Title 5. The administrative law judge shall conduct the hearing at a place

in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

. . . .

(g) Hearings, findings and conclusions, and order

(1) The administrative law judge shall commence the hearing under this section no later than 120 days following the issuance of the charge, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance of the charge, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(2) The administrative law judge shall make findings of fact and conclusions of law within 60 days after the end of the hearing under this section, unless it is impracticable to do so. If the administrative law judge is unable to make findings of fact and conclusions of law within such period, or any succeeding 60-day period thereafter, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(3) If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. . . .

. . . .

(5) In the case of an order with respect to a discriminatory housing practice that occurred in the course of a business subject to a licensing or regulation by a governmental agency, the Secretary shall, not later than 30 days after the date of the issuance of such order (or, if such order is judicially reviewed, 30 days after such order is in substance affirmed upon such review) –

(A) send copies of the findings of fact, conclusions of law, and the order, to that governmental agency; and

(B) recommend to that governmental agency appropriate disciplinary action (including, where appropriate, the suspension or revocation of the license of the respondent).

. . . .

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§ 3613. Enforcement by private persons

(a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding

under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.

. . . .

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or

other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

. . . .

(e) Intervention by Attorney General

Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 3614(e) of this title in a civil action to which such section applies.

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§ 3614. Enforcement by Attorney General

(a) Pattern or practice cases

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

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§ 3614a. Rules to implement subchapter

The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.

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§ 3617. Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

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* * *

Title 24, Code of Federal Regulations

§ 100.20 Definitions

Broker or *Agent* includes any person authorized to perform an action on behalf of another person regarding any matter related to the sale or rental of dwellings, including offers, solicitations or contracts and the administration of matters regarding such offers, solicitations or contracts or any residential real estate-related transactions.

24 C.F.R. § 100.20 (2002)

***Former* § 103.20 Persons against whom complaints may be filed.**

(a) A complaint may be filed against any person alleged to be engaged, to have engaged, or to be about to engage, in a discriminatory housing practice.

(b) A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale, rental, advertising or financing of dwellings or the provision of brokerage services relating to the sale or rental of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

24 C.F.R. § 103.20 (1999).

California Business & Professions Code

§ 10000. Short title

This part may be cited as the Real Estate Law.

(Added by Stats.1943, c. 127, § 1) (West 1987).

§ 10006. Person

"Person" includes corporation, company and firm.

(Added by Stats.1943, c. 127, p. 828, § 1. Amended by Stats.1968, c. 75, p. 222, § 1.)

§ 10011. Licensee

"Licensee," when used without modification, refers to a person, whether broker or salesman, licensed under any of the provisions of this part.

(Added by Stats.1943, c. 127, p. 829, § 1.)

§ 10032. Broker-salesperson relationship; independent contractor or employee; obligations to public

(a) All obligations created under Section 10000, and following, all regulations issued by the commissioner relating to real estate salespersons, and all other obligations of brokers and real estate salespersons to members of the public shall apply regardless of whether the real estate salesperson and the broker to whom he or she is licensed have characterized their relationship as one of "independent contractor" or of "employer and employee."

(b) A real estate broker and a real estate salesperson licensed under that broker may contract between themselves as independent contractors or as employer and employee, for purposes of their legal relationship with and

obligations to each other. Characterization of a relationship as either "employer and employee" or "independent contractor" for statutory purposes, including, but not limited to, withholding taxes on wages and for purposes of unemployment compensation, shall be governed by Section 650 and Sections 13000 to 13054, inclusive, of the Unemployment Insurance Code. For purposes of workers compensation the characterization of the relationship shall be governed by Section 3200, and following, of the Labor Code.

(Added by Stats.1991, c. 679 (S.B.630), § 1.)

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§ 10130. Necessity of license; complaints for violations; prosecutor

It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a real estate license from the department.

The commissioner may prefer a complaint for violation of this section before any court of competent jurisdiction, and the commissioner and his counsel, deputies or assistants may assist in presenting the law or facts at the trial.

It is the duty of the district attorney of each county in this state to prosecute all violations of this section in their respective counties in which the violations occur.

(Added by Stats.1943, c. 127, p. 835, § 1. Amended by Stats.1969, c. 138, p. 293, § 13, eff. Sept. 11, 1969.)

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§ 10131. Real estate broker

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

(e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or

on a business opportunity, and performs services for the holders thereof.

(Added by Stats.1943, c. 127, p. 835, § 1. Amended by Stats.1955, c. 1678, p. 3013, § 1; Stats.1959, c. 2116, p. 4933, § 3; Stats.1959, c. 2117, p. 4939, § 4; Stats.1960, 1st Ex.Sess., c. 45, p. 388, § 1; Stats.1961, c. 886, p. 2324, § 4, eff. June 28, 1961; Stats.1965, c. 172, p. 1134, § 5, operative Jan. 2, 1966; Stats.1984, c. 177, § 1.)

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§ 10132. Salesman

A real estate salesman within the meaning of this part is a natural person who, for a compensation or in expectation of a compensation, is employed by a licensed real estate broker to do one or more of the acts set forth in Sections 10131, 10131.1, 10131.2, 10131.3, 10131.4, and 10131.6.

(Added by Stats.1943, c. 127, p. 832, § 1. Amended by Stats.1955, c. 1678, p. 3013, § 2; Stats.1959, c. 2116, p. 4933, § 4, eff. July 20, 1959; Stats.1959, c. 2117, p. 4939, § 5; Stats.1960, 1st Ex.Sess., c. 45, p. 388, § 2; Stats.1961, c. 886, p. 2326, § 8, eff. June 28, 1961; Stats.1969, c. 928, p. 1855, § 2, operative Jan. 2, 1970; Stats.1974, c. 1351, p. 2932, § 3, operative July 1, 1975. Amended by Stats.1996, c. 587 (A.B.2711), § 2.)

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§ 10137. Unlicensed persons, employment; salesmen, payments through broker; violations

It is unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this chapter who is not a licensed real estate broker, or a real

estate salesman licensed under the broker employing or compensating him; provided, however, that a licensed real estate broker may pay a commission to a broker of another State.

No real estate salesman shall be employed by or accept compensation from any person other than the broker under whom he is at the time licensed.

It is unlawful for any licensed real estate salesman to pay any compensation for performing any of the acts within the scope of this chapter to any real estate licensee except through the broker under whom he is at the time licensed.

For a violation of any of the provisions of this section, the commissioner may temporarily suspend or permanently revoke the license of the real estate licensee, in accordance with the provisions of this part relating to hearings.

(Added by Stats.1943, c. 127, p. 836, § 1. Amended by Stats.1945, c. 660, p. 1316, § 1.)

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§ 10137.1. Partnership; performance of acts for which real estate broker license required

Nothing contained in this division shall preclude a partnership from performing acts for which a real estate broker license is required, provided every partner through whom the partnership so acts is a licensed real estate broker.

(Added by Stats.1968, c. 75, p. 222, § 2.)

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§ 10150. Brokers; application; license examination

(a) Application for the real estate broker license examination shall be made in writing to the commissioner. The commissioner may prescribe the format and content of the broker examination application. The application for the broker examination shall be accompanied by the real estate broker license examination fee.

(b) Persons who have been notified by the commissioner that they passed the real estate broker license examination may apply for a real estate broker license. Application for the real estate broker license shall be made in writing to the commissioner. The commissioner may prescribe the format and content of the broker license application. The application for the real estate broker license shall be accompanied by the appropriate fee.

(Added by Stats.1943, c. 127, p. 838, § 1. Amended by Stats.1947, c. 496, p. 1477, § 2; Stats.1965, c. 1489, p. 3470, § 1, operative Jan. 2, 1966; Stats.1967, c. 242, p. 1375, § 2; Stats.1969, c. 98, p. 220, § 1. Amended by Stats.1989, c. 640, § 2.)

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§ 10150.6. Brokers; experience and training qualifications

The Real Estate Commissioner shall not grant an original real estate broker's license to any person who has not held a real estate salesman's license for at least two years and qualified for renewal real estate salesman status, within the five-year period immediately prior to the date of his application for the broker's license, and during such time was not actively engaged in the business of real estate salesman, except that an applicant for a real

estate broker's license having at least the equivalent of two years' general real estate experience or graduation from a four-year college or university course, which course included specialization in real estate, files a written petition with the Department of Real Estate setting forth his qualifications and experience, and the commissioner approves, he may be issued a real estate broker's license immediately upon passing the examination and satisfying the other requirements of this article.

(Added by Stats.1949, c. 826, p. 1573, § 10. Amended by Stats.1957, c. 549, p. 1643, § 14; Stats.1961, c. 261, p. 1290, § 1; Stats.1963, c. 921, § 1; Stats.1969, c. 138, p. 293, § 14, eff. Sept. 11, 1969; Stats.1976, c. 375, p. 1023, § 7.)

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§ 10151. Salespersons; application; license examination

(a) Application for the real estate salesperson license examination shall be made in writing to the commissioner. The commissioner may prescribe the format and content of the salesperson examination application. The application for the salesperson examination shall be accompanied by the real estate salesperson license examination fee.

(b) Persons who have been notified by the commissioner that they passed the real estate salesperson examination may apply for a real estate salesperson license. Application for the real estate salesperson license application shall be made in writing to the commissioner. The commissioner may prescribe the format and content of the salesperson license application. The application for the real estate salesperson license shall be accompanied by the appropriate fee.

(Added by Stats.1943, c. 127, p. 838, § 1. Amended by Stats.1947, c. 496, p. 1477, § 3; Stats.1965, c. 1489, p. 3471, § 3, operative Jan. 2, 1966; Stats.1968, c. 397, p. 831, § 3. Amended by Stats.1989, c. 640, § 3.)

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§ 10152. Proof of character; hearing

The commissioner may require any other proof he or she may deem advisable concerning the honesty and truthfulness of any applicant for a real estate license, or of the officers, directors, or persons owning more than 10 percent of the stock, of any corporation making application therefor, before authorizing the issuance of a real estate license. For this purpose the commissioner may call a hearing in accordance with this part relating to hearings. To assist in his or her determination the commissioner shall require every original applicant to be fingerprinted.

(Added by Stats.1943, c. 127, p. 838, § 1. Amended by Stats.1968, c. 75, p. 222, § 2.5; Stats.1972, c. 354, p. 667, § 1; Stats.1977, c. 247, p. 1132, § 1. Amended by Stats.1988, c. 521, § 1.)

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§ 10153. Examination

In addition to the proof of honesty and truthfulness required of any applicant for a real estate license, the commissioner shall ascertain by written examination that the applicant, and in case of a corporation applicant for a real estate broker's license that each officer, or agent thereof through whom it proposes to act as a real estate licensee, has all of the following:

(a) An appropriate knowledge of the English language, including reading, writing, and

spelling and of arithmetical computations common to real estate and business opportunity practices.

(b) An understanding of the principles of real estate and business opportunity conveyancing, the general purposes and general legal effect of agency contracts, deposit receipts, deeds, mortgages, deeds of trust, chattel mortgages, bills of sale, land contracts of sale and leases, and of the principles of business and land economics and appraisals.

(c) A general and fair understanding of the obligations between principal and agent, of the principles of real estate and business opportunity practice and the canons of business ethics pertaining thereto, of the provisions of this part, of Chapter 1 (commencing with Section 11000) of Part 2, and of the regulations of the Real Estate Commissioner as contained in Title 10 of the California Administrative Code.

(Added by Stats.1943, c. 127, p. 839, § 1. Amended by Stats.1965, c. 172, p. 1136, § 10, operative Jan. 2, 1966; Stats.1968, c. 75, p. 222, § 3; Stats.1977, c. 247, p. 1132, § 2; Stats.1981, c. 714, p. 2583, § 30.)

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§ 10153.2. Educational requirements of applicants for real estate broker's license; waiver; credit for other courses

(a) An applicant to take the examination for an original real estate broker license shall also submit evidence, satisfactory to the commissioner, of successful completion, at an accredited institution, of:

(1) A three-semester unit course, or the quarter equivalent thereof, in each of the following:

(A) Real estate practice.

(B) Legal aspects of real estate.

(C) Real estate appraisal.

(D) Real estate financing.

(E) Real estate economics or accounting.

(2) A three-semester unit course, or the quarter equivalent thereof, in three of the following:

(A) Advanced legal aspects of real estate.

(B) Advanced real estate finance.

(C) Advanced real estate appraisal.

(D) Business law.

(E) Escrows.

(F) Real estate principles.

(G) Property management.

(H) Real estate office administration.

(I) Mortgage loan brokering and lending.

(J) Computer applications in real estate.

(b) The commissioner shall waive the requirements of this section for an applicant who is a member of the

State Bar of California and shall waive the requirements for which an applicant has successfully completed an equivalent course of study as determined under Section 10153.5.

(c) The commissioner shall extend credit under this section for any course completed to satisfy requirements of Section 10153.3 or 10153.4.

(Added by Stats.1984, c. 66, § 2. Amended by Stats.1993, c. 541 (A.B.1902), § 1; Stats.2001, c. 26 (S.B.329), § 1.)

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§ 10153.3. Educational requirements of applicants for taking the examination for a real estate salesperson license; waiver

In order to take an examination for a real estate salesperson license after January 1, 1986, an applicant shall submit evidence, satisfactory to the commissioner, of successful completion, at an accredited institution, of a three-semester unit course, or the quarter equivalent thereof, in real estate principles.

The commissioner shall waive the requirements of this section for an applicant who is a member of the State Bar of California, or who has completed an equivalent course of study, as determined under Section 10153.5, or who has qualified to take the examination for an original real estate broker license by satisfying the requirements of Section 10153.2.

(Added by Stats.1984, c. 66, § 3. Amended by Stats.1990, c. 728 (A.B.3070), § 3.)

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§ 10157. Authority personal to licensee

No real estate license gives authority to do any act specified in this chapter to any person, other than the person to whom the license is issued.

(Added by Stats.1943, c. 127, p. 840, § 1.)

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§ 10158. Corporations; additional licenses

When a real estate license is issued to a corporation, if it desires any of its officers other than the officer designated by it pursuant to Section 10211, to act under its license as a real estate broker, it shall procure an additional license to so employ each of such additional officers.

(Added by Stats.1943, c. 127, p. 830, § 1. Amended by Stats.1949, c. 826, p. 1571, § 2; Stats.1968, c. 75, p. 223, § 5.)

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§ 10159. Corporations; authority and status of licensed officer

Each officer of a corporation through whom it is licensed to act as a real estate broker is, while so employed under such license, a licensed real estate broker, but licensed only to act as such for and on behalf of the corporation as an officer.

(Added by Stats.1943, c. 127, p. 840, § 1. Amended by Stats.1968, c. 75, p. 223, § 6.)

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§ 10159.2. Responsibility of officer in charge for performance of acts for which real estate license required

(a) The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

(b) A corporate broker licensee that has procured additional licenses in accordance with Section 10158 through officers other than the officer designated pursuant to Section 10211 may, by appropriate resolution of its board of directors, assign supervisory responsibility over salespersons licensed to the corporation to its broker-officers.

(c) A certified copy of any resolution of the board of directors assigning supervisory responsibility over real estate salespersons licensed to the corporation shall be filed with the Real Estate Commissioner within five days after the adoption or modification thereof.

(Added by Stats.1979, c. 595, p. 1856, § 1, operative July 1, 1980.)

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§ 10159.5. Application for license to be issued under fictitious name

Every person applying for a license under this chapter who desires to have such license issued under a fictitious business name shall file with his application a certified

copy of his fictitious business name statement filed with the county clerk pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7.

(Added by Stats.1957, c. 510, p. 1548, § 1. Amended by Stats.1970, c. 618, p. 1222, § 2.)

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§ 10162. Place of business; license provisions

Every licensed real estate broker shall have and maintain a definite place of business in the State of California which shall serve as his office for the transaction of business. This office shall be the place where his license is displayed and where personal consultations with clients are held.

No real estate license authorizes the licensee to do business except from the location stipulated in the real estate license as issued or as altered pursuant to Section 10161.8.

(Added by Stats.1943, c. 127, p. 840, § 1. Amended by Stats.1945, c. 660, p. 1322, § 13; Stats.1953, c. 871, p. 2216, § 5; Stats.1968, c. 397, p. 832, § 8.)

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§ 10163. Place of business; branches; additional licenses

If the applicant for a real estate broker's license maintains more than one place of business within the State he shall apply for and procure an additional license for each branch office so maintained by him. Every such application shall state the name of the person and the location of the place or places of business for which such license is desired. The commissioner may determine

whether or not a real estate broker is doing a real estate brokerage business at or from any particular location which requires him to have a branch office license.

(Added by Stats.1943, c. 127, p. 841, § 1.)

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§ 10170. Legislative determination

The Legislature has determined that it is in the public interest of consumer protection and consumer service that all real estate licensees licensed under the provisions of this part comply with continuing education requirements adopted by the commissioner pursuant to this article as a prerequisite to the renewal of real estate licenses on and after January 1, 1981.

(Added by Stats.1976, c. 1346, p. 6132, § 6.)

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§ 10170.5. Renewal of license; required educational courses

(a) Except as otherwise provided in Sections 10153.4 and 10170.8, no real estate license shall be renewed unless the commissioner finds that the applicant for license renewal has, during the four-year period preceding the renewal application, successfully completed the 45 clock hours of education provided for in Section 10170.4, including all of the following:

(1) A three-hour course in ethics, professional conduct, and legal aspects of real estate, which shall include, but not be limited to, relevant legislation, regulations, articles, reports, studies, court decisions, treatises, and information of current interest.

(2) A three-hour course in agency relationships and duties in a real estate brokerage practice, including instruction in the disclosures to be made and the confidences to be kept in the various agency relationships between licensees and the parties to real estate transactions.

(3) A three-hour course in trust fund accounting and handling.

(4) A three-hour course in fair housing.

(5) Not less than 18 clock hours of courses or programs related to consumer protection, and designated by the commissioner as satisfying this purpose in his or her approval of the offering of these courses or programs, which shall include, but not be limited to, forms of real estate financing relevant to serving consumers in the marketplace; land use regulation and control; pertinent consumer disclosures; agency relationships; capital formation for real estate development; fair practices in real estate; appraisal and valuation techniques; landlord-tenant relationships; energy conservation; environmental regulation and consideration; taxation as it relates to consumer decisions in real estate transactions; probate and similar disposition of real property; governmental programs such as revenue bond activities, redevelopment, and related programs; business opportunities; and mineral, oil, and gas conveyancing.

(6) Other courses and programs that will enable a licensee to achieve a high level of competence in serving the objectives of consumers who may engage the services of licensees to secure the transfer, financing, or similar objectives with respect to real property, including organizational

and management techniques that will significantly contribute to this goal.

(b) Except as otherwise provided in Section 10170.8, no real estate license shall be renewed for a licensee who already has renewed under subdivision (a), unless the commissioner finds that the applicant for license renewal has, during the four-year period preceding the renewal application, successfully completed the 45 clock hours of education provided for in Section 10170.4, including a six-hour update survey course that covers the subject areas specified in paragraphs (1) to (4), inclusive, of subdivision (a).

(c) Any denial of a license pursuant to this section shall be subject to Section 10100.

(Added by Stats.1994, c. 10 (A.B.244), § 4, eff. Feb. 23, 1994, operative Jan. 1, 1996. Amended by Stats.1997, c. 232 (A.B.447), § 3; Stats.1998, c. 507 (A.B.1770), § 1.)

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§ 10171.5. Officer of corporate broker; necessity of compliance

A person who is licensed as a real estate broker only as an officer of a corporate broker pursuant to Section 10158 or 10211 shall not be eligible for the renewal of such license nor for the issuance of a license in an individual capacity or as an officer of a corporate broker licensed pursuant to Section 10158 or 10211, unless and until such person has completed the continuing education requirements of this article.

(Formerly § 10171.1, added by Stats.1980, c. 263, p. 536, § 2. Renumbered § 10171.5 and amended by Stats.1983, c. 413, § 4.)

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§ 10175. Authority to revoke or suspend licenses

Upon grounds provided in this article and the other articles of this chapter, the license of any real estate licensee may be revoked or suspended in accordance with the provisions of this part relating to hearings.

(Added by Stats.1943, c. 127, p. 841, § 1.)

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§ 10176. Investigations; conduct of business; grounds for suspension or revocation

The commissioner may, upon his own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

(a) Making any substantial misrepresentation.

(b) Making any false promises of a character likely to influence, persuade or induce.

(c) A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salesmen.

(d) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto.

(e) Commingling with his own money or property the money or other property of others which is received and held by him.

(f) Claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to perform any acts set forth in Section 10131 for compensation or commission where such agreement does not contain a definite, specified date of final and complete termination.

(g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of such licensee the full amount of such licensee's compensation, commission or profit under any agreement authorizing or employing such licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of such agreement, whether evidenced by documents in an escrow or by any other or different procedure.

(h) The use by a licensee of any provision allowing the licensee an option to purchase in an agreement authorizing or employing such licensee to sell, buy, or exchange real estate or a business opportunity for compensation or commission, except when such licensee prior to or coincident with election to exercise such option to purchase reveals in writing to the employer the full amount

of licensee's profit and obtains the written consent of the employer approving the amount of such profit.

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(j) Obtaining the signature of a prospective purchaser to an agreement which provides that such prospective purchaser shall either transact the purchasing, leasing, renting or exchanging of a business opportunity property through the broker obtaining such signature, or pay a compensation to such broker if such property is purchased, leased, rented or exchanged without the broker first having obtained the written authorization of the owner of the property concerned to offer such property for sale, lease, exchange or rent.

(Added by Stats.1943, c. 127, p. 841, § 1. Amended by Stats.1945, c. 660, p. 1317, § 4; Stats.1949, c. 826, p. 1571, § 5; Stats.1953, c. 762, p. 2025, § 2; Stats.1955, c. 1467, p. 2675, § 1; Stats.1965, c. 172, p. 1137, § 11, operative Jan. 2, 1966; Stats.1967, c. 242, p. 1375, § 3.)

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§ 10177. Grounds

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

(a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or any salesperson, by fraud, misrepresentation, or deceit, or by making any material misstatement of fact in an application for a real estate license, license renewal, or reinstatement.

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

(c) Knowingly authorized, directed, connived at, or aided in the publication, advertisement, distribution, or circulation of any material false statement or representation concerning his or her business, or any business opportunity or any land or subdivision (as defined in Chapter 1 (commencing with Section 11000) of Part 2) offered for sale.

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

(e) Willfully used the term "realtor" or any trade name or insignia of membership in any

real estate organization of which the licensee is not a member.

(f) Acted or conducted himself or herself in a manner that would have warranted the denial of his or her application for a real estate license, or has either had a license denied or had a license issued by another agency of this state, another state, or the federal government revoked or suspended for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and only upon an express finding of a violation of law by the agency or entity.

(g) Demonstrated negligence or incompetence in performing any act for which he or she is required to hold a license.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

(i) Has used his or her employment by a governmental agency in a capacity giving access

to records, other than public records, in a manner that violates the confidential nature of the records.

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(k) Violated any of the terms, conditions, restrictions, and limitations contained in any order granting a restricted license.

(l) Solicited or induced the sale, lease, or listing for sale or lease of residential property on the ground, wholly or in part, of loss of value, increase in crime, or decline of the quality of the schools due to the present or prospective entry into the neighborhood of a person or persons of another race, color, religion, ancestry, or national origin.

(m) Violated the Franchise Investment Law (Division 5 (commencing with Section 31000) of Title 4 of the Corporations Code) or regulations of the Commissioner of Corporations pertaining thereto.

(n) Violated the Corporate Securities Law of 1968 (Division 1 (commencing with Section 25000) of Title 4 of the Corporations Code) or the regulations of the Commissioner of Corporations pertaining thereto.

(o) Failed to disclose to the buyer of real property, in a transaction in which the licensee is an agent for the buyer, the nature and extent of a licensee's direct or indirect ownership interest in that real property. The direct or indirect ownership interest in the property by a person related

to the licensee by blood or marriage, by an entity in which the licensee has an ownership interest, or by any other person with whom the licensee has a special relationship shall be disclosed to the buyer.

(p) Violated Section 10229.

If a real estate broker that is a corporation has not done any of the foregoing acts, either directly or through its employees, agents, officers, directors, or persons owning or controlling 10 percent or more of the corporation's stock, the commissioner may not deny the issuance of a real estate license to, or suspend or revoke the real estate license of, the corporation, provided that any offending officer, director, or stockholder, who has done any of the foregoing acts individually and not on behalf of the corporation, has been completely disassociated from any affiliation or ownership in the corporation.

(Added by Stats.1943, c. 127, p. 842, § 1. Amended by Stats.1949, c. 826, § 6; Stats.1953, c. 762, § 3; Stats.1955, c. 1467, § 2; Stats.1959, c. 1873, § 1; Stats.1961, c. 886, § 18, eff. June 28, 1961; Stats.1963, c. 1960, § 7, operative Sept. 1, 1964; Stats.1965, c. 172, § 12, operative Jan. 2, 1966; Stats.1965, c. 1223, § 1; Stats.1970, c. 1400, § 1, operative Jan. 1, 1971; Stats.1971, c. 438, § 10; Stats.1976, c. 1346, § 7; Stats.1977, c. 991, § 2; Stats.1979, c. 595, § 2, operative July 1, 1980. Amended by Stats.1987, c. 588, § 1; Stats.1988, c. 160, § 4; Stats.1988, c. 521, § 2; Stats.1989, c. 1360, § 7; Stats.1990, c. 1335 (A.B.3594), § 1; Stats.1998, c. 507 (A.B.1770), § 2; Stats.1999, c. 83 (S.B.966), § 7; Stats.2001, c. 389 (A.B.795), § 1.)

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§ 10211. Corporation license

If the licensee is a corporation, the license issued to it entitles one officer thereof, on behalf of the corporation, to engage in the business of real estate broker without the payment of any further fee, such officer to be designated in the application of the corporation for a license. For each officer other than the officer so designated, through whom it engages in the business of real estate broker, the appropriate original or renewal fee is to be paid in addition to the fee paid by the corporation.

(Added by Stats.1943, c. 127, p. 843, § 1. Amended by Stats.1947, c. 496, p. 1478, § 11; Stats.1949, c. 826, p. 1571, § 3; Stats.1956, c. 4, p. 125, § 15.)

Title 10, California Code of Regulations

§ 2720. Minimum Age.

A real estate broker license shall not be issued to a person who has not attained the age of 18 years.

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§ 2725 Broker Supervision.

A broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage:

(a) Transactions requiring a real estate license.

(b) Documents which may have a material effect upon the rights or obligations of a party to the transaction.

(c) Filing, storage and maintenance of such documents.

(d) The handling of trust funds.

(e) Advertising of any service for which a license is required.

(f) Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination.

(g) Regular and consistent reports of licensed activities of salespersons.

The form and extent of such policies, rules, procedures and systems shall take into consideration the number of

salespersons employed and the number and location of branch offices.

A broker shall establish a system for monitoring compliance with such policies, rules, procedures and systems. A broker may use the services of brokers and salespersons to assist in administering the provisions of this section so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker.

(Eff. 11-13-96, Register 96, No. 46).

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§ 2731. Use of False or Fictitious Name.

(a) A license[e] shall not use a fictitious name in the conduct of any activity for which a license is required under the Real Estate Law unless the licensee is the holder of a license bearing the fictitious name.

(b) The Department shall issue a license required under the Real Estate Law only in the legal name of the licensee or in the fictitious business name of a broker. . . .

(Eff. 7/31/83, Register 83, No. 30).

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§ 2740. Broker Officers.

No acts for which a real estate license is required may be performed for, or in the name of, a corporation when there is no officer of the corporation licensed under Section 10158 or 10211.

(Eff. 11-13-96, Register 96, No. 46).

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§ 2743. Assignment of Supervisory Responsibility.

(a) A resolution assigning supervisory responsibility over salespersons licensed to a corporate broker is in compliance with Section 10159.2 of the Code if the assignment is made by reference to a specified business address or addresses of the corporate broker rather than by the listing of the names of salespersons subject to the supervision of the broker officer.

(b) In filing the resolution with the Department, the following information shall be furnished on a form prescribed by the Department:

(1) Name, business address and license number of the corporate broker.

(2) Name of the individual broker licensee who was responsible for supervision of the salespersons in question immediately preceding the effective date of the resolution.

(Eff. 8-8-80, Register 80, No. 28).

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§ 2746. Corporate Real Estate Brokers, Officers, Directors and Shareholders.

(a) At the time of application for, or in the reinstatement of, an original real estate broker license, the designated officer shall file a background statement of information for each director, the chief executive officer, the president, first level vice presidents, secretary, chief financial officer, subordinate officers with responsibility for forming policy of the corporation and all natural persons owning or controlling more than ten percent of its shares, if such person has been the subject of any of the following:

(1) Received an order or judgment issued by a court or governmental agency during the preceding 10 years temporarily or permanently restraining or enjoining any business conduct, practice or employment;

(2) Has had a license to engage in or practice real estate or other regulated profession, occupation or vocation denied, suspended or revoked during the preceding 10 years;

(3) Engaged in acts requiring a real estate license of any state without the benefit of a valid license or permit authorizing that conduct during the preceding 10 years which have been enjoined by a court of law or administrative tribunal;

(4) Been convicted of a crime which is substantially related to the qualifications, functions or duties of a licensee of the Department as specified in Section 2910 of these Regulations (excluding drunk driving, reckless driving and speeding violations).

(b) The background statement shall be set forth in DRE Form 212 and shall inquire only about the information to be disclosed pursuant to subdivision (a). The background statement must be verified and completed by each corporate officer, director or stockholder as named in subdivision (a) to the fullest extent of the signatory's actual knowledge.

(c) Whenever there is a change in the persons whose background statements are required to be on file with the Department for a corporate licensee pursuant to subdivision (a) or an addition to the persons required to file statements pursuant to subdivision (a), the designated officer of the corporation shall, within 30 days thereafter,

file with the Department a background statement of information for each new or changed person.

(Eff. 1-29-98, Register 98, No. 1).

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§ 2780. Discriminatory Conduct As the Basis for Disciplinary Action.

Prohibited discriminatory conduct by a real estate licensee based upon race, color, sex, religion, ancestry, physical handicap, marital status or national origin includes, but is not limited to, the following:

(a) Refusing to negotiate for the sale, rental or financing of the purchase of real property or otherwise making unavailable or denying real property to any person because of such person's race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

(b) Refusing or failing to show, rent, sell or finance the purchase of real property to any person or refusing or failing to provide or volunteer information to any person about real property, or channeling or steering any person away from real property, because of that person's race, color, sex, religion, ancestry, physical handicap, marital status or national origin or because of the racial, religious, or ethnic composition of any occupants of the area in which the real property is located.

It shall not constitute discrimination under this subdivision for a real estate licensee to refuse or fail to show, rent, sell or finance the purchase of real property to any person having a physical handicap because of the presence of hazardous conditions or architectural barriers to

the physically handicapped which conform to applicable state or local building codes and regulations.

(c) Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin against any person in the sale or purchase or negotiation or solicitation of the sale or purchase or the collection of payment or the performance of services in connection with contracts for the sale of real property or in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

Prohibited discriminatory conduct by a real estate licensee under this subdivision does not include acts based on a person's marital status which are reasonably taken in recognition of the community property laws of this state as to the acquiring, financing, holding or transferring of real property.

(d) Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin against any person in the terms, conditions or privileges of sale, rental or financing of the purchase of real property.

This subdivision does not prohibit the sale price, rent or terms of a housing accommodation containing facilities for the physically handicapped to differ reasonably from a housing accommodation not containing such facilities.

(e) Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin against any person in providing services or facilities in connection with the sale, rental or financing of the purchase of

real property, including but not limited to: processing applications differently, referring prospects to other licensees because of the prospect's race, color, sex, religion, ancestry, physical handicap, marital status or national origin, using with discriminatory intent or effect, codes or other means of identifying minority prospects or assigning real estate licensees on the basis of a prospective client's race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

Prohibited discriminatory conduct by a real estate licensee under this subdivision does not include acts based on a person's marital status which are reasonably taken in recognition of the community property laws of this state as to the acquiring, financing, holding or transferring of real property.

(f) Representing to any person because of his or her race, color, sex, religion, ancestry, physical handicap, marital status or national origin that real property is not available for inspection, sale or rental when such real property is in fact available.

(g) Processing an application more slowly or otherwise acting to delay, hinder or avoid the sale, rental or financing of the purchase of real property on account of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of a potential owner or occupant.

(h) Making any effort to encourage discrimination against persons because of their race, color, sex, religion, ancestry, physical handicap, marital status or national origin in the

showing, sale, lease or financing of the purchase of real property.

(i) Refusing or failing to cooperate with or refusing or failing to assist another real estate licensee in negotiating the sale, rental or financing of the purchase of real property because of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of any prospective purchaser or tenant.

(j) Making any effort to obstruct, retard or discourage the purchase, lease or financing of the purchase of real property by persons whose race, color, sex, religion, ancestry, physical handicap, marital status or national origin differs from that of the majority of persons presently residing in a structural improvement to real property or in an area in which the real property is located.

(k) Performing any acts, making any notation, asking any questions or making or circulating any written or oral statement which when taken in context, expresses or implies a limitation, preference or discrimination based upon race, color, sex, religion, ancestry, physical handicap, marital status or national origin; provided, however, that nothing herein shall limit the administering of forms or the making of a notation required by a federal, state or local agency for data collection or civil rights enforcement purposes; or in the case of a physically handicapped person, making notation, asking questions or circulating any written or oral statement in order to serve the needs of such a person.

(l) Making any effort to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of such person's

having exercised or enjoyed, or on account of such person's having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by a federal or state law, including but not limited to: assisting in any effort to coerce any person because of his or her race, color, sex, religion, ancestry, physical handicap, marital status or national origin to move from, or to not move into, a particular area; punishing or penalizing real estate licensees for their refusal to discriminate in the sale or rental of housing because of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of a respective purchaser or lessee; or evicting or taking other retaliatory action against any person for having filed a fair housing complaint or for having undertaken other lawful efforts to promote fair housing.

(m) Soliciting of sales, rentals or listings of real estate from any person, but not from another person within the same area because of differences in the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of such persons.

(n) Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin in informing persons of the existence of waiting lists or other procedures with respect to the future availability of real property for purchase or lease.

(o) Making any effort to discourage or prevent the rental, sale or financing of the purchase of real property because of the presence or absence of occupants of a particular race, color, sex, religion, ancestry, physical handicap, marital status or national origin, or on the basis of the

future presence or absence of a particular race, color, sex, religion, ancestry, physical handicap, marital status or national origin, whether actual, alleged or implied.

(p) Making any effort to discourage or prevent any person from renting, purchasing or financing the purchase of real property through any representations of actual or alleged community opposition based upon race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

(q) Providing information or advice to any person concerning the desirability of particular real property or a particular residential area(s) which is different from information or advice given to any other person with respect to the same property or area because of differences in race, color, sex, religion, ancestry, physical handicap, marital status or national origin of such persons.

This subdivision does not limit the giving of information or advice to physically handicapped persons for the purpose of calling to the attention of such persons the existence or absence of housing accommodation services or housing accommodations for the physically handicapped.

(r) Refusing to accept a rental or sales listing or application for financing of the purchase of real property because of the owner's race, color, sex, religion, ancestry, physical handicap, marital status or national origin or because of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of any of the occupants in the area in which the real property is located.

(s) Entering into an agreement, or carrying out any instructions of another, explicit or understood, not to show, lease, sell or finance the purchase of real property because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

(t) Making, printing or publishing, or causing to be made, printed or published, any notice, statement or advertisement concerning the sale, rental or financing of the purchase of real property that indicates any preference, limitation or discrimination because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin, or any intention to make such preference, limitation or discrimination.

This subdivision does not prohibit advertising directed to physically handicapped persons for the purpose of calling to the attention of such persons the existence or absence of housing accommodation services or housing accommodations for the physically handicapped.

(u) Using any words, phrases, sentences, descriptions or visual aids in any notice, statement or advertisement describing real property or the area in which real property is located which indicates any preference, limitation or discrimination because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

This subdivision does not prohibit advertising directed to physically handicapped persons for the purpose of calling to the attention of such persons the existence or absence of housing accommodation services or housing accommodations for the physically handicapped.

(v) Selectively using, placing or designing any notice, statement or advertisement having to do with the sale, rental or financing of the purchase of real property in such a manner as to cause or increase discrimination by restricting or enhancing the exposure or appeal to persons of a particular race, color, sex, [religion,] ancestry, physical handicap, marital status or national origin.

This subdivision does not limit in any way the use of an affirmative marketing program designed to attract persons of a particular race, color, sex, religion, ancestry, physical handicap, marital status or national origin who would not otherwise be attracted to the real property or to the area.

(w) Quoting or charging a price, rent or cleaning or security deposit for a particular real property to any person which is different from the price, rent or security deposit quoted or charged to any other person because of differences in the race, color, sex, religion, ancestry, physical handicap, marital status or national origin or such persons.

This subdivision does not prohibit the quoting or charging of a price, rent or cleaning or security deposit for a housing accommodation containing facilities for the physically handicapped to differ reasonably from a housing accommodation not containing such facilities.

(x) Discriminating against any person because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin in performing any acts in connection with the making of any determination of financial ability or in

the processing of any application for the financing or refinancing of real property.

Nothing herein shall limit the administering of forms or the making of a notation required by a federal, state or local agency for data collection or civil rights enforcement purposes. In any evaluation or determination as to whether, and under what terms and conditions, a particular lender or lenders would be likely to grant a loan, licensees shall proceed as though the lender or lenders are in compliance with Sections 35800 through 35833 of the California Health and Safety Code (The Housing Financial Discrimination Act of 1977).

Prohibited discriminatory conduct by a real estate licensee under this subdivision does not include acts based on a person's marital status which are reasonably taken in recognition of the community property laws of this state as to the acquiring, financing, holding or transferring of real property.

(y) Advising a person of the price or value of real property on the basis of factors, related to the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of residents of an area or of residents or potential residents of the area in which the property is located.

(z) Discriminating in the treatment of, or services provided to, occupants of any real property in the course of providing management services for the real property because of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of said occupants.

This subdivision does not prohibit differing treatment or services to a physically handicapped person because of the physical handicap, marital status in the course of providing management services for a housing accommodation.

(aa) Discriminating against the owners or occupants of real property because of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of their guests, visitors or invitees.

(bb) Making any effort to instruct or encourage, expressly or impliedly, by either words or acts, licensees or their employees or other agents to engage in any discriminatory act in violation of a federal or state fair housing law.

(cc) Establishing or implementing rules that have the effect of limiting the opportunity for any person because of his or her race, color, sex, religion, ancestry, physical handicap, marital status or national origin to secure real property through a multiple listing or other real estate service.

(dd) Assisting or aiding in any way, any person in the sale, rental or financing of the purchase of real property where there are reasonable grounds to believe that such person intends to discriminate because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

(Eff. 1/2/81, Register 80, No. 49).

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§ 2781. Panic Selling As the Basis for Disciplinary Action.

Prohibited discriminatory conduct includes, but is not limited to, soliciting sales or rental listings, making written or oral statements creating fear or alarm, transmitting written or oral warnings or threats, or acting in any other manner so as to induce or attempt to induce the sale or lease of real property through any representation, express or implied, regarding the present or prospective entry of one or more persons of another race, color, sex, religion, ancestry, marital status or national origin into an area or neighborhood.

(Eff. 1-2-81, Register 80, No. 49).

* * *

PERTINENT LEGISLATIVE HISTORY RE 1979 AMENDMENTS TO CAL. BUS. & PROF. CODE § 10159.2

SENATE COMMITTEE ON BUSINESS & PROFESSIONS 7/11/79

Staff Analysis of AB 985 (Hannigan)
As Amended May 3, 1979

HISTORY: Assembly Bill 985 was introduced at the request of the Department of Real Estate. It passed the Assembly on Consent.

BACKGROUND: The Business and Professions Code stipulates that a person or persons applying for a corporate license to practice real estate must designate in the application an officer of the proposed corporation who holds a valid real estate broker's license. That person becomes the 'designated officer' of the corporation. The purpose of this provision is to provide the public, in its dealings with real estate corporations, the same licensing protections afforded it in dealing with non-corporate real estate concerns.

As currently worded, however, there is no stipulation in the law as to the designated officer's control or supervisory responsibilities over the corporation. Because the corporation is a legal 'person', acts committed by it or its employees cannot be held against the officer unless that officer took part personally in those actions.

As a result, there is nothing to prevent unlicensed persons from obtaining authorization of a licensee to use that licensee's name and then proceed to carry on business free of any licensee participation or direction. According to the Department of Real Estate, there have been instances of

just such arrangements, with a licensee pocketing a retainer fee but taking no active role in the corporate activities. Action can be taken against such corporations in subsequent cases of breach of the Real Estate Law, and the corporate license is subject to revocation. But there is nothing to stop unscrupulous operators from forming new corporations with the same arrangements. There is no remedy against the licensee who lent his name to the corporation application.

PROPOSED LEGISLATION: AB 985 stipulates that the designated officer named on the corporate license application assumes responsibility for officer's, employee's and salesperson's compliance with the provisions of the Real Estate Law. AB 985 also mandates that failure of the designated officer to exercise reasonable supervision and control over the activities of the corporation is grounds for suspension or revocation of that designated officer's real estate brokers license.

AB 985 further allows real estate corporations to designate, by proper resolution delivered to the Real Estate Commissioner, delegation of supervisory responsibility over salespersons to other licensed brokers who are officers of the corporation.

COMMENTS: AB 985 attempts to insure licensed supervision of real estate corporation activity by holding designated officers personally responsible for that supervision. In this way, holders of brokers licenses will be discouraged from lending their names to arrangements in which they will play the role of 'absentee' designated officer.

This bill is aimed at small, fly-by-night 'corporations' that have exploited existing loopholes in order to evade the

substantive requirements of licensed corporate supervision. According to the Department of Real Estate, established real estate corporations are already careful to ensure licensed supervision, since the good name of their corporations is an invaluable asset.

POSITIONS:

Support – Department of Real Estate
California Association of Realtors

There is no known opposition.

* * *

ASSEMBLY COMMITTEE ON LABOR, EMPLOYMENT, & CONSUMER AFFAIRS Bill Lockyer, Chairman
HEARING DATE: April 24, 1979

BILL: AB 985
AUTHOR: Hannigan
SUBJECT: Real Estate Corporate Licenses

BACKGROUND

The State of California, through the Department of Real Estate, licenses brokers and salespersons engaged in the business of real property sales. Under the law, there exists provisions for the issuance of a broker's license to corporations, entitling them to engage in all the activities permitted to a licensed natural person. One of these provisions requires that a corporation have an individual licensed as a broker in his or her own right, serving as a "designated officer." The corporate license is issued on the basis of this person's qualifications, but remains a totally separate license. While a corporate license might be revoked for corporate misdeeds, the license of the designated officer would remain untouched unless he or she personally

participated in the acts leading to revocation. This duality in licensing leaves the designated officer with only an implied duty to oversee corporate operations. There currently exists no statutory responsibility on the part of the designated officer to supervise the activities of employees as they exercise the corporate license.

There are approximately 11,500 corporate licenses in existence today.

BILL

AB 985 provides that failure of a designated officer to exercise reasonable supervision and control over corporate broker activities is grounds for action against the designated officer's personal broker license. It states the affirmative responsibility of the designated officer to exercise such supervision and control. It also permits corporations to divide up management responsibility among any number of designated officer brokers if such assignment is done by resolution of the board of directors and filed with the Real Estate Commissioner.

ANALYSIS

1. The licensing of corporate "persons" has always been problematic: the state is confronted with the dilemma of guaranteeing the professional competence and proficiency of a legal fiction. Traditionally, the problem is resolved by requiring the direct supervisory control of the corporation's professional actions by a licensed individual who is himself qualified. This is meant to ensure that the corporation knows how to do the job. It is difficult for the state to guarantee the active supervisory role of the licensed individual, however; while a person might be the "designated

officer" or the "responsible managing officer", he or she might only be lending a name and license number to the corporation. Problems in this regard have been especially acute among contractors, where individuals have even advertised their license for "sale" in newspapers. The only way that the active participation of the licensed individual can be ensured is by "piercing the corporate veil" and making the individual licensee vulnerable to action on account of corporate misdeeds, or on account of failure to fulfill corporate responsibilities.

2. Under the terms of the law, real estate brokers are responsible for supervising the activities of their salespersons and employees. The corporate licensee, as a broker, has a similar responsibility, which it cannot fulfill. A paper entity cannot supervise.

3. The granting of the corporate license is predicated upon the qualifications of the designated officer in the first place. It is no injustice to demand that the person standing for the corporation at licensing continue to stand for the corporation. That is an implicit assumption of the law anyway.

4. According to the sponsors of the bill, problems have arisen with small-time operators who establish a number of corporations under the licenses of various "friendly" brokers, then proceed to act in whatever way they choose until detected by the Department. One corporate license may be lifted but others remain, and the brokers party to the offending corporation remain beyond the grasp of the Department. This bill should end such arrangements.

SUPPORT: Dept. of Real Estate

* * *

LEGISLATIVE PROPOSAL – REVISED

DEPARTMENT: Real Estate R-15
SUBJECT: Responsible Managing Employee
PROPOSAL: To require the officer designated by a licensed real estate corporation to supervise the real estate acts of the corporation.

ANALYSIS

A. Detailed

Under existing law, a corporation may obtain a real estate broker license enabling the corporation to perform all acts for which a broker license is required. Business and Professions Code Sections 10153, 10158, 10159 and 10211 provide for the obtaining of a corporate broker license. In order to obtain that license, a corporation must secure the services of a natural person who possesses a real estate broker license. That person becomes the "designated officer" (anything from corporate president to third assistant secretary) of the corporation for real estate licensing purposes. The corporate license is issued largely on the strength of the qualifications of the designated officer. However, since the corporation is a separate licensed entity, the designated officer has, under current law, no further responsibility for corporate licensed acts in which the designated officer does not personally participate. Consequently, there is no affirmative duty on the part of any natural person to supervise corporate licensed acts. Current law allows for disciplinary action against the corporate license but not against the designated officer if that officer did not participate in the wrongful act.

This proposal seeks to create an affirmative duty on the part of the "designated officer" to supervise the activities

of a corporate licensee in performing acts for which a real estate license is required. The bill also makes a failure to exercise such supervisiion [sic] grounds for discipline agains [sic] the designated officer's license. This proposal is similar to legislation currently in effect regarding contractors' licenses (Business and Professions Code Section 7068.1).

The bill allows for the assignment of management responsibility where there is more than one designated officer.

B. Cost

No fiscal impact on this Department or other affected agencies.

HISTORY

None.

ARGUMENTS

In the case of large, well established real estate corporate brokers, this lack of affirmative duty does not create many problems. The established corporations have sufficient interest in retaining their corporate licenses to insure that corporate activities are well monitored and supervised. The need for this legislation arises from the proliferation of small, closely held corporations. It is not unusual to see one person (often unlicensed himself) create three or four corporations and obtain real estate licenses for each of them. Given the ease in obtaining a corporate license, and the relative ease in locating an accommodating "designated officer," there is no incentive to insure that the corporate licensee complies with all provisions of law. If the corporate license is revoked or suspended, licensed

activities could continue under another related corporate license or a new corporation could be formed and a license obtained through the good offices of the original designated officer.

Since the corporate license was issued largely in reliance upon the qualifications and character of the designated officer, it is reasonable to expect that officer to take an active role in the conduct of the corporation's business for which a real estate license is required.

REASONS FOR PROPOSAL

1. The real estate law places the responsibility for supervision of salespersons and employees upon a real estate broker. Even though a corporate real estate licensee is itself a broker, the corporate entity is not as qualified as a natural person to exercise the supervision necessary to insure public protection.

2. Lack of active supervision by a designated officer has resulted in abuses and injury.

3. Since a corporate license is issued based upon the qualifications, experience and good character of the designated officer, that officer should continue to take an active role in the conduct of corporate real estate acts.

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No. 01-1120

(13)

Supreme Court, U.S.
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CLERK

In The
Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF THE PETITIONER

BROWN & PEEL
JAMES W. PEEL
3585 West Beechwood
Suite 101
Fresno, California 93711
(559) 431-1300

BENEDON & SERLIN
DOUGLAS G. BENEDON*
GERALD M. SERLIN
21700 Oxnard Street,
Suite 1290
Woodland Hills, California
91367
(818) 340-1950
**Counsel of Record*

Attorneys for Petitioner
David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Plaintiffs, and their *amici*, distance themselves conspicuously from both the reasoning and broad holding of the Ninth Circuit. They make no argument that a corporate owner or officer is absolutely liable for an employee's or agent's violation of the Fair Housing Act ("FHA" or "Act"). Nor do they argue that liability can be imposed based on a "nondelegable duty" under the FHA. Instead, Plaintiffs suggest the following "rule" should be adopted by the Court in every action under the Act: "[A] corporation's officer/broker, charged under state licensing law with the duty to supervise and control the licensed activities of corporate salespersons, is liable for the FHA violations committed by those salespersons acting under the corporation's license." Brief of Respondents ("Resp. Br.") 10.

Plaintiffs' proposed rule, however, like the decision of the Ninth Circuit, imposes absolute liability based on a "right of control" under state law rather than established common-law principles of agency and corporate law. Consequently, Plaintiffs' proposed rule, like the decision of the Ninth Circuit, cannot withstand scrutiny.

ARGUMENT

I.

A CORPORATE OFFICER/BROKER IS NOT VICARIOUSLY LIABLE FOR VIOLATIONS OF THE FHA BY THE CORPORATION'S AGENTS AND EMPLOYEES.

A. Under The Common Law, A Corporate Officer Is Not The Principal Of The Corporate Employees Under His Control And Supervision.

1. Agency under the common law is not based solely on the right of control. According to Plaintiffs, "Meyer's statutorily mandated duty to control the activities of Triad salespersons defines the agency relationship between them. . . . [A]ll that is needed is the right to control." Resp. Br. 23 (emphasis omitted). Control, alone, however, is not enough to establish an agency relationship under the common law. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392 (1982) (quoting Restatement (Second) Agency § 1 (1957)). Agency is thus comprised of two components: (1) consent "to act on . . . behalf" of another person *and* (2) subject to his control. Control alone is insufficient.

2. A corporate employee or agent acts on behalf of the corporation, not the supervising officer. Under the above common-law definition of agency, the corporate entity constitutes the principal, and the officers and supervisors are agents of the principal, as are the subordinate employees. 3A *Fletcher, Cyclopedia of Corporations* § 1135 (Perm.Ed.) This is so because an individual corporate

officer or supervisor may have the authority to direct or control a subordinate employee on behalf of the corporation, but the subordinate employee does not stand in a "fiduciary relation" to the officer or supervisor or act "on his behalf." Rather, the subordinate stands in a fiduciary relationship to the corporate employer itself, on whose behalf he acts, rather than to any individual within the corporate hierarchy.[1]

Thus, while the corporation can be vicariously liable under a theory of respondeat superior (see, *e.g., Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 761 (1998)), a supervising officer or employee cannot:

> The words 'respondeat superior' imply that the doctrine is one of superior officer's liability, but it isn't; it is a doctrine about employers and . . . other principals. It has no application to a case where A, B's supervisor, is sued because B commits a tort. There is, in fact, no common law doctrine of superior officer's liability. *Rosenthal & Co. v. Commodity Futures Trading Com'n*, 802 F.2d 963, 967 (7th Cir. 1986).

See also, Restatement (Second) of Agency § 358, cmt. a (1957) ("The doctrine of respondeat superior does not apply to create liability against an agent for the conduct of

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[1] Importantly, the California statute upon which Plaintiffs rely recognizes that corporate officers and employees are acting "on behalf" of the corporation, not the officer/broker:

> "The officer designated by a corporate broker license . . . shall be responsible for the supervision and control of the activities conducted *on behalf of the corporation* by its officers and employees. . . . " Cal. B&P Code § 10159.2, emphasis added.

servants and other agents of the principal appointed by him, even though other agents are subject to his orders in the execution of the principal's affairs."); *Browning-Ferris Indus. of Ill v. Ter Maat,* 195 F.3d 953, 956 (7th Cir. 1999) ("[T]here is no doctrine of 'superiors' liability' comparable to the doctrine of respondeat superior,. . . .); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1390 (7th Cir. 1984) ("[T]he doctrine [of respondeat superior] has no reference (despite its name) to the liability of another employee who happens merely to be the supervisor but not the employer of the employee who commits the tort. The common-law does not hold a superior strictly liable for the torts of the employees he supervises. . . . ").

B. Neither The FHA Nor The HUD Regulations Demonstrate A Congressional Intent To Impose Vicarious Liability On Officer/Brokers Based On A Right Of Control.

1. The FHA does not abrogate common-law rules of agency and corporate law. The starting point for determining whether the FHA abrogates common-law rules of agency and corporate law is the language of the statute itself. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S.Ct. 941, 950 (2002). Plaintiffs are unable to state what portion of the FHA's text supports their proposed rule that corporate officer/brokers should be vicariously liable for a corporate employee's violation of the Act, based on their state law duty to control and supervise the activities of the corporate employee. This silence cannot be ignored. See, *United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must

speak directly to the question addressed by the common law"); *United States v. Bestfoods*, 524 U.S. 51, 70 (1998) (Congressional silence is "dispositive").

The FHA proscribes discriminatory conduct without expressly, or even implicitly, suggesting that liability is to be vicariously imposed on a corporate officer/broker when a corporate employee or agent violates the Act. By contrast, where Congress has sought to expand the class of liable parties to include supervisory employees it has done so expressly.

For example, the word "employer" is defined broadly enough in the Fair Labor Standards Act to permit naming another employee rather than the employer as defendant, provided the defendant had supervisory authority over the complaining employee. See 29 U.S.C. § 203(d) (employer within the meaning of the Fair Labor Standards Act includes "any person acting directly or indirectly in the interest of an employer in relation to an employee"); *Patel v. Wargo*, 803 F.2d 632, 637-638 (11th Cir. 1986). No such expansive language is found in the FHA. 42 U.S.C. §§ 3604-06.

Similarly, Congress has spoken directly when it has imposed a "control test" such as that proposed by Plaintiffs as a replacement for the traditional standards governing vicarious liability. For example, the Securities Exchange Act of 1934 expresses the issue in these terms:

> Every person who, directly or indirectly, controls any person liable under the provisions of this chapter . . . shall also be liable jointly and severally with and to the same extent as such controlled person. 15 U.S.C. § 78(t)(a).

In sum, "[w]hen Congress wished to create such [secondary] liability, it had little trouble doing so." *Cent.*

Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 184 (1994). Congress has demonstrated no such expansionist intent in the FHA. It should not be read into the statute by the courts. *W. Va Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 101 (1991).

2. The HUD regulations demonstrate an intent to adhere to common-law principles of agency and vicarious liability. Plaintiffs, like the Court of Appeals, rely on *former* 24 C.F.R. § 103.20(b) (1999) which provided for filing an administrative complaint

> against any person who directs or controls, or has the right to direct or control, the conduct of another person . . . if that other person, acting within the scope of his or her authority *as employee or agent of the directing or controlling person* [violates the Act]. Emphasis added; see Resp. Br. 31-33.

Thus, the regulation (when it was in effect) did not authorize the filing of an administrative complaint against any person based solely on "the right to direct or control the conduct of another." The regulation further required that the person engaged in a discriminatory housing practice must have acted "as employee or agent of the directing or controlling person."

A corporate employee, however, is not the "employee or agent" of a supervising officer. Even when a corporate officer or supervisor is authorized to direct or control the job-related conduct of another employee, that employee remains the "employee or agent" of the corporation itself,

not the individual officer or supervisor.[2] See, *e.g.*, Restatement (Second) of Agency § 358, cmt. a (1957). Accordingly, the text of the regulation, when read as a whole, incorporates traditional agency principles.

HUD's contemporaneous explanation of the former regulation further clarifies the agency's intent to incorporate, not deviate from, traditional common-law agency principles. HUD first addressed the issue of vicarious liability in 1984, when it published a *proposed* § 105.13, entitled "Persons against whom complaints may be filed." Subdivision (b) of this section was substantially identical to the language in § 103.20, *except* that it omitted the requirement that the agent be acting "in the scope of employment." 49 Fed. Reg. 40533 (proposed Oct. 16, 1984); see, *Walker v. Crigler*, 976 F.2d 900, 906 (4th Cir. 1992).

In response to concerns that the regulation could be interpreted as imposing strict vicarious liability on corporate officers for the unlawful acts of the corporation's agents, HUD's comments accompanying the publication of the final version of the rule – which was the version relied on by the court of appeals – make clear this was *not* HUD's intent. According to HUD,

> NAR [National Association of Realtors®] contended that the judicial decisions do not establish a rule of absolute liability (without fault) as

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[2] It is undisputed that at all relevant times Crank (and all Triad salespersons) were employed by Triad and were acting as Triad sales agents. J.A. 8 ("Each agent of Triad, including Grove Crank, Terry Stump and Lois Carrol, is employed by Triad under the supervision or direction of Mr. Meyer in his capacity as its broker and president"); see also, J.A. 40; J.A.L. 10-11.

> paragraph (b) would impose. NAR argued that *the decided cases* focus only on the liability of a broker for conduct of his or her salespersons, but *do not mandate absolute liability on the basis of mere right 'to direct or control'* without reference to instructions, policies, compliance programs and other actions of the principal.... In response, it is not HUD's intent to impose absolute liability on any principal; *the intent, in proposing paragraph (b), was to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to liability of a principal for acts of an agent.... Walker v. Crigler, supra,* 976 F.2d at 907, citing 53 Fed. Reg. 24185 (1988), added emphasis; see also, 54 Fed. Reg. 3260-61 (1989).

Although the cases apparently referred to by HUD (see Gov't Br. 19, n. 3) recognized that principles of vicarious liability apply to suits under the FHA, those decisions taken together cannot be said to reflect a judicial consensus regarding the precise application of those principles. Several of the cases deal with the liability of the corporate employers rather than of individual officers or supervisors. See, *e.g., Marr v. Rife*, 503 F.2d 735, 740-742 (7th Cir. 1974); *United States v. Northside Realty Assocs,* 474 F.2d 1164, 1168 (5th Cir. 1973). Others hold the corporate officer liable for his personal participation in the discriminatory conduct. See, *e.g., Northside Realty Assocs v. United States,* 605 F.2d 1348, 1354 (5th Cir. 1979). None holds

that common-law rules of agency and corporate law should be disregarded in adjudicating claims under the FHA.[3]

Thus, HUD's comments confirm the most straightforward reading of the text of former § 103.20: established principles of agency law, and not strict liability based on a state created right of control, govern imposition of vicarious liability under the FHA. See, *United States v. Balistrieri,* 981 F.2d 916, 930 (7th Cir. 1992) (principals may be held liable for the conduct of their agents in violation of the FHA under established rules of agency); Carla Caplan, *The Decline And Recent Revival Of Absolute Vicarious Liability Under The Fair Housing Act*, 48 Rutgers L. Rev. 581, 600-01 (1996) ("A study of HUD guidelines and their evolution ... reveals that HUD supports using ordinary agency principles for FHA claims").[4]

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[3] Plaintiffs also cite three administrative law judge decisions which they contend endorse a "direct or control" standard for liability. Resp. Br. 33-34 and fn. 15. In *HUD v. Active Agency,* Fair Housing – Fair Lending Rptr. ¶ 25,141 (HUD ALJ 1999) the ALJ relied on *Cabrera v. Jakabovitz*, 24 F.3d 372, 389 (2nd Cir. 1992). In *Cabrera*, the court applied traditional doctrines of respondeat superior and found landlords liable for discrimination by their brokers. *Id.*, at 385-88. In *HUD v. Properties Unlimited*, Fair Housing – Fair Lending Rptr. ¶ 25,009 (HUD ALJ 1991) the company was a fictitious business, and thus not a separate legal entity. Accordingly, the ALJ found the owner vicariously liable for the discriminatory conduct of his own employees. Finally, in *HUD v. Murphy*, Fair Housing – Fair Lending Rptr. ¶ 25,002 (HUD ALJ 1990) the ALJ imposed liability under a non-delegable duty theory. Even Plaintiffs do not attempt to impose liability under the FHA on this theory. See Resp. Br. 43. These administrative decisions, alone or together, do not constitute an endorsement of a "right of control" standard.

[4] Plaintiffs cite HUD's definition of "Broker" or "Agent" as creating a broader definition of agency under the FHA. Resp. Br. 32-33. That definition "includes any person authorized to perform an action *on*

(Continued on following page)

C. Abandoning Common-Law Principles Of Agency And Corporate Law Is Not Necessary To Further The Purpose Of The FHA.

The declared policy of the FHA is "to provide within constitutional limitations for fair housing throughout the United States." 42 U.S.C. § 3601. According to Plaintiffs, ignoring the corporate form in order to impose vicarious liability on an officer/broker is necessary to achieve that objective. Resp. Br. 34-36. This is incorrect.

1. Under existing law, victims of discrimination have a remedy against the agent who is directly liable for the discrimination, the agent's corporate principal and, in certain limited circumstances, the corporate officer. Plaintiffs who allege they are victims of FHA violations are not without recourse under established principles of agency and corporate law. They can pursue their action against the agent who is directly liable for the alleged discrimination, as well as his corporate employer under a theory of respondeat superior. No legitimate policy is furthered by additionally imposing vicarious liability on an innocent officer or supervisor based solely on his right of control over the corporation's employees under state law.

Moreover, an individual officer or supervisor still faces liability under the FHA for the consequences of his own violations of the Act. Such liability, however, is direct, not vicarious. "Although a supervisor could of course be held liable by reason of his personal fault . . . that would not be

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behalf of another person regarding any matter related to the sale . . . of dwellings," thus incorporating, rather than deviating from, HUD's stated intent to follow established rules of agency. 24 C.F.R. § 100.20 (2002), emphasis added.

by virtue of respondeat superior, a doctrine of imputed liability." *Rosenthal & Co. v. Commodity Futures Trading Com'n, supra,* 802 F.2d at 967. Importantly, in the present case, Plaintiffs did not allege Meyer *personally* engaged in discrimination against Plaintiffs in violation of the FHA. J.A. 7-15. This was confirmed by both the district court (J.A. 30 ["plaintiffs do not allege that Meyer had anything to do with the actions described in the complaint"]), and by the Court of Appeals (J.A. 66 ("the evidence does not indicate that Crank acted with the approval or at the direction of Meyer")).

2. The corporate form is not inimical to the purpose of the FHA. According to Plaintiffs, to achieve the goal of the FHA requires that brokers be held liable "regardless of their business form." Plaintiffs cite to statistics in California that 85 percent of real estate brokers in this state use a non-corporate business form. Therefore, Plaintiffs assert, "[t]o hold that Meyer, as Crank's supervising broker, is responsible for Crank's discrimination would thus do no more than equate Meyer's responsibilities with those of the vast majority of his fellow brokers. . . . " Resp. Br. 34-36. Plaintiffs' invitation to summarily dispense with the corporate form should not be accepted by the Court.

Far from being an aberration, the corporation is an integral, and critical, component of the economy of this country. "[T]he corporation is an insulator from liability from creditors. . . . Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson v. Abbott,* 321 U.S. 349, 361-62 (1944); *Cedric Kushner Promotions Ltd. v. King,* 533 U.S. 158, 163 (2001). This is as true for one-person corporations as it is for large ones. *Nelson v. Adams USA, Inc.,* 529 U.S. 460, 471 (2000) ("One-person corporations are

authorized by law and should not lightly be labeled sham"); *Kirno Hill Corp. v. Holt*, 618 F.2d 982, 985 (2nd Cir. 1980) ("[I]ndeed, individuals may incorporate for the very purpose of avoiding personal liability").

Moreover, to hold corporate officer/brokers vicariously liable would do far more than equate them with the "vast majority of other brokers," as Plaintiffs suggest. Even though corporate licensees represent only 14 percent of all licensed brokers in California, a full 45 percent of all licensed salespersons work for these corporate brokers. See CAR Br. 5-6. It is only by reason of the protection afforded by the corporate form that officer/brokers are able to take on this responsibility. See CAR Br. 8-9. Thus, far from the innocuous consequences predicted by Plaintiffs, adopting their proposed rule to impose vicarious liability on corporate officer/brokers would, in California alone, affect nearly half of the real estate salespeople in the state and seriously undermine the entire real estate industry.

II.

MEYER IS NOT LIABLE AS A LICENSEE.

Plaintiffs assert that "Meyer is liable as the licensee under whose license Crank acted." Resp. Br. 36-39.[5] According to Plaintiffs, such liability adheres "[a]part from whether Meyer and Crank are considered to have a

[5] The district court found Crank was licensed as a salesperson for Triad, not Meyer. J.A. 52-55. The court of appeals agreed that the licensed broker is the corporation, but nevertheless held Meyer could be liable based on his responsibility to supervise corporate employees. J.A. 68-69.

principal-agent relationship or whether Meyer may be vicariously liable for Crank's discrimination." Resp. Br. 36. Thus, it appears (although it is by no means clear) that Plaintiffs are asserting that Meyer is absolutely liable under the FHA based on a state licensing scheme. This argument – which once again turns on an interpretation and application of state law to determine liability under a federal statute – should be summarily rejected for two separate reasons.

First, personal liability of a corporate officer under the FHA cannot be premised on the theory of a nondelegable duty under state law. The only relevant authority cited by Plaintiffs is a comment to Restatement Second Torts § 214, which sets forth the concept of a nondelegable duty.[6] See, *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra*, 458 U.S. at 395-96.[7] As discussed in Meyer's opening brief (Pet. Br. 21-27), and as plaintiffs apparently concede (Resp. Br. 43 and n. 20), the FHA does not impose a nondelegable duty. Assuming such a duty exists under state law, it cannot be grafted onto the FHA without direction from Congress. See, *Moor v. Alameda County,* 411 U.S. 693, 701-702 (1973).

[6] Restatement Second Torts § 214 provides:

> A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.

[7] The other authority cited by Plaintiffs – *Chicago, Burlington and Quincy RR v. Willard*, 220 U.S. 413, 421-24 (1911) and *Railroad Co. v. Barron*, 5 Wall. (72 U.S.) 90 (1866) – addressed liability between lessor and lessee railroads.

Second, as recognized by both the district court and the court of appeals, Triad salespersons acted under Triad's, not Meyer's license. Meyer has not held a broker's license as an individual since the early 1980's, *i.e.*, well before the incidents alleged in Plaintiffs' complaint. J.A.L. 3. At all relevant times, *Triad was the corporate licensee*, with Meyer designated as Triad's officer/broker. Meyer's broker's license was thus valid only as an officer of Triad. J.A.L. 3-4, 8; Cal. B&P Code §§ 10159, 10211.

Accordingly, Triad was Crank's exclusive employing broker. J.A. 40; J.A.L. 10-11. Indeed, during the relevant period each of the agents in the office were acting under Triad's corporate license, and not under a license held by Meyer as an individual. J.A. 40.

Thus, none of the alleged discriminatory acts were committed by an agent acting under Meyer's individual license. Accordingly, liability cannot be imposed on this basis.

III.

VIOLATION OF A STATE IMPOSED DUTY TO SUPERVISE DOES NOT GIVE RISE TO LIABILITY UNDER THE FHA.

In their first amended complaint, Plaintiffs pled causes of action under state law for statutory and general negligence, based on Meyer's alleged breach of his statutory duty to supervise and control the corporation's sales agents. J.A. 22-23. These state causes of action were dismissed by the district court. J.A. 28-30. Plaintiffs did not appeal from the dismissal of their state claims. See Appellants' Opening Brief. Plaintiffs now raise these claims in this Court, claiming Meyer's alleged violation of

a "nondelegable duty" under state law gives rise to liability under the FHA.[8] Resp. Br. 39-44. Plaintiffs' attempt to resurrect their state law claims in this Court under the guise of a federal statute should be rejected.

The FHA itself does not impose a duty to supervise, and does not make a failure to supervise a violation of the Act. 42 U.S.C. § 3604. Thus, liability under the FHA for a failure to supervise could only be accomplished by supplementing the Act with state law. However, the state statutory scheme cannot be used to create substantive federal liability without direction from Congress. *Moor v. Alameda County, supra,* 411 U.S. at 701-02.

As the Court has cautioned, "[f]ederal law is no jurisdictional chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of venue statutes. It is found in the federal Constitution, statutes, or common law." *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 471-472 (1942).

The Court should reject Plaintiffs' proposal to create a standard of liability under the FHA tethered in each case to an in-depth inquiry into the vagaries of state licensing laws. See, Resp. App. 1-10. The duty of a corporate officer/broker to control and supervise the corporation's

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[8] Plaintiffs concede that "this case does not even raise the issue whether the FHA itself imposes a nondelegable duty not to discriminate." Instead, they contend, "the nondelegable nature of Meyer's duties arises out of the law of California." Resp. Br. 43, footnote and citations omitted.

employees is a duty imposed by state law, the breach of which can and should be remedied under state law.[9] See, Resp. App. 8-10. Liability under the FHA is, and should be, a question of federal law.

IV.

PLAINTIFFS WAIVED AN ALTER EGO CLAIM BY FAILING TO PROPERLY PLEAD IT OR RAISE IT ON APPEAL.

Plaintiffs argue for the first time in this Court that Meyer can be held individually liable as the alter ego of Triad. Resp. Br. 45-47.[10] While the alter ego doctrine may be available in the appropriate case (see, *United States v. Bestfoods, supra,* 524 U.S. at 62-63), plaintiffs cannot rely on that theory due to their failure to both properly plead this claim in the district court or raise it in the Court of Appeals.

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[9] Plaintiffs suggest that leaving enforcement of state statutory schemes to the states is somehow inadequate. They cite a letter from Commissioner Pool of the California Department of Real Estate that since 1990 the Department has not disciplined a licensee for violation of state or federal fair housing laws. Resp. Br. 22, n. 9. A reading of Commissioner Pool's letter belies this reliance. Commissioner Pool states that "without physically reviewing every disciplinary file, it is not possible to determine the exact number of actions taken against real estate brokers for acts of discrimination." Moreover, to the extent the Department has not been required to discipline brokers for discrimination, Commissioner Pool's letter is evidence of the efficacy of the state regulatory scheme, and supports federal abstention from, rather than intervention in, state law.

[10] This argument was first raised by the Government in its *amicus* brief. Gov't Br. 24-28.

First, Plaintiffs never pled alter ego in the district court. "While specificity may not be required to plead an alter ego theory, one must allege more than ownership, shareholder or partnership status." *Leykis v. NYP Holdings, Inc.*, 899 F.Supp. 986, 991-92 (E.D.N.Y. 1995); see, *Zinaman v. USTS New York, Inc.*, 798 F.Supp. 128, 132 (S.D.N.Y. 1992) (dismissing alter ego theory for failure to plead "control and dominion"); see also, *Kirno Hill Corp. v. Holt, supra,* 618 F.2d at 985 (sole ownership "does not alone justify piercing the corporate veil").

The need to plead alter ego with specificity is critical because it involves a substantive theory of liability. "Alter ego/veil piercing claims involve a substantive theory for imposing liability upon entities that would, on first blush, not be thought liable for a tort or on a contract." *Futura Development of Puerto Rico, Inc. v. Estado Libre Asociado de Puerto Rico*, 144 F.3d 7, 12 (1st Cir. 1998). Thus, it is of particular importance that a pleading of alter ego give "fair notice" of the claim being asserted and the "grounds upon which it rests." See, *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

Here, plaintiffs' only allegation was that Triad was "owned and operated by Mr. Meyer, who served and continues to serve [as] its president and designated officer/broker." J.A. 7. Such an allegation is insufficient as a matter of law to plead a theory of alter ego, and certainly did not give Meyer fair notice of an alter ego claim. See, *Nelson v. Adams USA, Inc., supra,* 529 U.S. at 471 ("One-person corporations are authorized by law and should not lightly be labeled sham"); *Leykis v. NYP Holdings, Inc., supra,* 899 F.Supp. at 991-92; 1 *Fletcher, Cyclopedia of Corporations*, § 41.35 at 665-66 (1999) ("[T]he mere fact that all or almost all of the corporate stock is owned by one

individual or a few individuals will not afford sufficient grounds for disregarding corporateness").

Second, Plaintiffs did not raise or brief alter ego in the court of appeals, and have thus waived the issue. See, Appellants' Opening Brief. This Court will not reach an issue which was not raised or briefed below. *TRW, Inc. v. Andrews*, ___ U.S. ___, 122 S.Ct. 441, 451 (2001); *Sims v. Apfel*, 530 U.S. 103, 109 (2000), quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

The Government attempts to salvage Plaintiffs' argument by asserting the issue was properly raised in a footnote on the last page of argument in Plaintiffs' opening brief in the Court of Appeals. Gov't Br. 24, fn. 6.[11] The Government's attempt is unavailing. Merely referencing a contention in a footnote is insufficient to preserve the issue for appellate review. See *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992); Fed. R. App. P. 28(a)(9)(A).

More important is the text of the footnote itself. Plaintiffs stated their "evidence would show that Mr. Meyer is the *sole* shareholder of Triad, and thus an argument to pierce the corporate veil would be meritorious." Appellants' Opening Br. 59, n. 17, original emphasis. This statement merely reiterates the allegation in their complaint that Meyer could be personally liable based on his status as the sole shareholder of Triad, not on any other indicia of alter ego. This is an insufficient basis as a matter of law for finding alter ego. See, *Nelson v. Adams USA, Inc.*, *supra*, 529 U.S. at 471; *Kirno Hill Corp. v. Holt*,

[11] Plaintiffs make no such claim in their brief. Resp. Br. 45-47.

supra, 618 F.2d at 985; 1 *Fletcher Cyclopedia*, *supra*, § 41.35 at 665-66.

Third, allowing Plaintiffs to raise alter ego for the first time before this Court would be fundamentally unfair. "[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, *supra*, 312 U.S. at 556.

For example, Plaintiffs (and the Government) speculate that Meyer may have failed to observe basic corporate formalities. Resp. Br. 46; Gov't Br. 26. This assertion is disingenuous. Since Plaintiffs never raised alter ego in the trial court, Meyer cannot be faulted for omitting to present any evidence on this issue.

Similarly specious is Plaintiffs' and the Government's representation that "Triad itself appears to be without assets." Gov't Br. 26; Resp. Br. 5 ("It is undisputed that Crank and Triad are unable to pay any judgment in this case"). The only evidence before the district court was that there is no insurance coverage for the alleged acts of discrimination. J.A. 27. Triad remains an operating real estate corporation in good standing.

In sum, Plaintiffs cannot, and should not, be allowed to raise an alter ego theory for the first time in this Court. *TRW, Inc. v. Andrews, supra,* 122 S.Ct. at 451.

CONCLUSION

For the reasons set forth above and in Meyer's opening brief, the judgment of the court of appeals should be reversed.

Dated: October 30, 2002

Respectfully submitted,

BROWN & PEEL
JAMES W. PEEL
3585 West Beechwood
Suite 101
Fresno, California 93711
(559) 431-1300

BENEDON & SERLIN
DOUGLAS G. BENEDON*
GERALD M. SERLIN
21700 Oxnard Street,
Suite 1290
Woodland Hills, California
91367
(818) 340-1950
Counsel of Record

Attorneys for Petitioner
David Meyer, individually and in his capacity as president and designated officer / broker of Triad, Inc., dba Triad Realtors

(9)

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In the Supreme Court of the United States

DAVID MEYER, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT AND DESIGNATED OFFICER/BROKER OF TRIAD, INC., ETC., PETITIONER

v.

EMMA MARY ELLEN HOLLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

THEODORE B. OLSON
Solicitor General
Counsel of Record

RALPH F. BOYD, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DAVID K. FLYNN
ANDREA PICCIOTTI-BAYER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTIONS PRESENTED

The brief for the United States will address the following questions:

1. Whether the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, and implementing regulations promulgated by the Department of Housing and Urban Development, establish broader rules of vicarious liability than would apply under general principles of agency and corporate law.

2. Whether the court of appeals' judgment in this case, which reversed the district court's dismissal of respondents' suit and remanded the case for further proceedings, should be affirmed.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

The Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, prohibits discrimination in housing on the basis of race, color, religion, sex, disability, familial status, and national origin. The Department of Housing and Urban Development (HUD) conducts administrative hearings in FHA cases and has promulgated regulations implementing the Act. In resolving the question of vicarious liability presented in this case, the court of appeals relied in part on former 24 C.F.R. 103.20 (1999), a HUD regulation in effect at the time of the discriminatory conduct alleged here, which defined the class of persons against whom administrative complaints to enforce the FHA could properly be filed. The substance of that regulation is retained in current 24 C.F.R. 103.202. In addition, the Attorney General is authorized to file suit to enforce the FHA when, *inter alia*, he concludes that a

"pattern or practice" of violations exists. 42 U.S.C. 3614. In light of the responsibilities exercised by HUD and the Department of Justice for implementation of the FHA, and the court of appeals' reliance on HUD's regulations, the United States has a substantial interest in the question presented here.

STATEMENT

1. The Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(b). The Act further provides that "[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. 3605(a). The FHA defines the term "person" to include "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries." 42 U.S.C. 3602(d).

The FHA may be enforced either through the filing of an administrative complaint with HUD, or through a civil action in federal court. See 42 U.S.C. 3610-3614.[1] At the time

[1] Civil actions to enforce the FHA may be filed either by a private person who is aggrieved by a violation, 42 U.S.C. 3613, or by the Attorney General when, *inter alia*, he has reason to believe that a "pattern or practice" of violations exists, 42 U.S.C. 3614.

of the discriminatory acts alleged in this case, HUD regulations provided the following guidance regarding the filing of an administrative complaint:

> (a) A complaint [under the FHA] may be filed [with HUD] against any person alleged to be engaged, to have engaged, or to be about to engage, in a discriminatory housing practice.
>
> (b) A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale * * * of dwellings * * * if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

24 C.F.R. 103.20 (1999). In 1999, HUD revised its regulations pertaining to administrative complaints. 64 Fed. Reg. 18,538. Under the regulations in their current form, notice that a complaint has been filed must be served on "any person who directs or controls, or who has the right to direct or control, the conduct of another person who is involved in a fair housing complaint." 24 C.F.R. 103.202(b).

2. The plaintiffs in this case (respondents in this Court) are Emma Mary Ellen Holley, an African-American woman; David Holley, a Caucasian man; their son, Michael Holley; and Brooks Bauer, a builder. The complaint alleges that in October 1996, the Holleys visited the Twenty-Nine Palms, California, office of Triad, Inc. (Triad), an incorporated real estate firm.[2] The Holleys met with a Triad salesperson, Grove Crank, and asked about listings for new houses in the

[2] Because the district court granted petitioner's motion for summary judgment, the facts must be construed in the light most favorable to respondents.

price range of $100,000 to $150,000. Crank showed them four houses, each priced at more than $150,000. The next month, the Holleys identified a home that happened to be listed by Triad. A different Triad salesperson, Terry Stump, informed the Holleys that the house was listed for $145,000. The Holleys offered to pay the asking price and to put $5000 in escrow for the builder to hold the house until April or May of 1997, when they were to close escrow on the sale of their current home. When Ms. Holley called the builder (Bauer), he told her that the offer seemed fair, but that it should go through Triad. Pet. App. 2-3.

Stump subsequently called the Holleys and told them that more experienced agents in Triad's office, one of whom was later identified as Crank, felt that $5000 was insufficient to induce the builder to hold the house for six months. The Holleys decided not to raise the offer, and Triad never formally presented the offer to Bauer. One week later, Bauer stopped by Triad's office and asked Crank about the status of the Holleys' offer. Crank thereupon used racially derogatory language in referring to the Holleys and told Bauer that he did not want to deal with them. The Holleys eventually hired a builder to construct a house for them, and Bauer later sold his house for approximately $20,000 less than the Holleys had offered. Pet. App. 3.

California law provides that a corporation may not engage in acts for which a real estate license is required unless the corporation has designated one of its officers to serve as the licensed officer/broker of the company. Pet. App. 12-13. "Under California law, a real estate broker is required to exercise reasonable supervision over the activities of his or her salespersons, including familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination." *Id.* at 12. At the time of the alleged acts of discrimination in this case, petitioner David Meyer was the designated officer/broker of Triad, as well as

the company's president. See *id.* at 6. From 1978 until 1995, petitioner was also Triad's sole shareholder; his ownership of the company since that time is disputed. See *id.* at 9-10 n.4.

3. On November 14, 1997, respondents filed suit against Crank and Triad, asserting a variety of federal and state claims. They later filed a separate action against petitioner, and the district court consolidated the two cases. The court subsequently dismissed as time-barred all claims except the FHA claim. Pet. App. 3-4, 31-32.

With regard to the FHA claim, the district court denied petitioner's motion to dismiss. Pet. App. 22-25. The court found that petitioner's status as an officer of Triad provided no valid basis for holding him personally liable, stating that "any liability against [petitioner] as an officer of Triad would only attach to Triad in that [respondents] have not urged theories that could justify reaching [petitioner] individually." *Id.* at 23. The court held, however, that petitioner's status as designated broker of Triad might provide a basis for imposing personal liability upon him, and that respondents could recover from petitioner individually if they could prove that an FHA violation had been committed by an employee operating under a broker's license held by petitioner as an individual rather than as a corporate officer. *Id.* at 24-25.

The district court subsequently granted petitioner's motion for summary judgment on the FHA claim. Pet. App. 29-36. The court stated that "[a] licensed broker under whose license employees operate may be liable for the discriminatory actions of those employees." *Id.* at 33. The court held, however, that

> where the license is held by a corporation, the liability attaches to the corporation and not to the officers of the corporation who did not engage in discriminatory conduct. Therefore, the sole issue in this summary judgment motion is whether [petitioner] holds his broker's license as an individual or as an officer of Triad, Inc.

Id. at 34.

The district court explained that "[i]n California, both corporations and individuals have to be licensed to operate as real estate brokers. If the licensee is a corporation, the license entitles one officer from the corporation to act as a real estate broker for the corporation and he must be designated as such on the license." Pet. App. 35-36. The court concluded that because in this case "the real estate license was issued to Triad, Inc. with [petitioner] as the designated corporate officer of Triad, Inc. * * *, Crank's discriminatory acts are imputed to Triad, Inc. and not to [petitioner] as an individual. Hence [petitioner] cannot be held personally liable for Crank's alleged misconduct." *Id.* at 36.

The district court certified its judgment with respect to petitioner for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b). Respondents' FHA claims against Triad and Crank remain pending in the district court. See Pet. App. 4.

4. The Court of Appeals for the Ninth Circuit reversed the district court's grant of summary judgment and remanded the case for further proceedings. Pet. App. 1-16. The court stated that, "[a]lthough under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the Fair Housing Act [are] different." *Id.* at 2. The thrust of the court's reasoning was as follows:

> Although officers and shareholders of a corporation generally enjoy immunity from liability for corporate acts, as a matter of furthering the compelling policy of the FHA and because this involves a non delegable duty, we conclude that a corporation and its officers may be held liable for their failure to ensure the corporation's compliance with the FHA, whether or not the officers directed or authorized the particular discriminatory acts

> that occurred. * * * * The overriding societal priority of the FHA indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and to ensure that similar harm will not occur again. When one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden.

Id. at 6-7 (footnote omitted). The court also relied in part on 24 C.F.R. 103.20 (1999), stating that petitioner's "undisputed responsibility to supervise Triad's salespersons in real estate transactions places him squarely within HUD's regulatory history allowing complaints against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling." Pet. App. 14.

SUMMARY OF ARGUMENT

I. A. Under the FHA and HUD's implementing regulations, questions of vicarious liability are resolved by application of general agency and corporate law principles. Under those principles, a master is vicariously liable for torts committed by his servants within the scope of their employment, as well as for torts committed outside the scope of employment when the servant is aided in the commission of the tort by the existence of the agency relation. The principal is liable in that setting regardless of whether he knew of or intended the wrongful conduct or was negligent in preventing it from occurring. While a corporation generally is a potentially liable "master" under those principles, an individual corporate officer or supervisor is not. A typical officer or supervisor does not stand in a principal-agent relationship to subordinate employees and is therefore not generally subject to vicarious liability.

B. Neither the FHA, nor HUD's implementing regulations, reflect an intent to depart from general agency and

corporate law principles in resolving questions of vicarious liability for violations of the Act. The text of the Act does not articulate distinct standards for determining the scope of vicarious liability, nor does it suggest that background agency principles should be disregarded. The most natural inference is that courts in FHA cases should follow generally applicable rules of agency and corporate law. That is the approach this Court has taken in resolving questions of vicarious liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In deviating from traditional agency principles, the court of appeals misinterpreted former 24 C.F.R. 103.20(b) (1999), a HUD regulation governing administrative complaint proceedings. Both the text of that rule, and the agency's contemporaneous explanation of its own regulation, make clear that HUD intended to incorporate, rather than to depart from, generally applicable agency principles.

II. Although the court of appeals erred in finding traditional agency principles inapplicable to the FHA, the judgment of the court of appeals, reversing the district court's dismissal of respondents' claims and remanding the case for further proceedings, should be affirmed. Under generally applicable principles of agency and corporate law, respondents should have an opportunity to establish that petitioner is subject to personal liability under corporate veil-piercing principles. Under federal common-law principles, a court in determining whether to pierce the corporate veil considers whether a unity of interests exists between the corporation and the individual shareholder, whether corporate formalities have been disregarded, and whether limited shareholder liability would lead to inequitable results.

Respondents have alleged that petitioner was Triad's sole shareholder at the time of Crank's discriminatory conduct. Taken together with petitioner's roles as Triad's president

and designated officer/broker, his status as sole shareholder (if proved) would suggest that petitioner exercised pervasive control over the corporation's affairs. Respondents may also be able to demonstrate that petitioner ignored corporate formalities. Finally, because Triad appears to be without assets, piercing of the corporate veil may be necessary to prevent inequitable results. That is particularly so in light of respondents' allegation that petitioner negligently performed his responsibilities as Triad's designated officer/broker.

ARGUMENT

I. UNDER THE FHA AND HUD'S IMPLEMENTING REGULATIONS, QUESTIONS OF VICARIOUS LIABILITY ARE RESOLVED BY APPLICATION OF GENERAL AGENCY AND CORPORATE LAW PRINCIPLES

A. Under Established Principles, A Person's Actual Or Potential Control Over The Conduct Of A Subordinate May Give Rise To Liability, Without Regard To Personal Fault, For The Subordinate's Tortious Or Other Wrongful Conduct

Congress may establish specific rules for indirect liability under a particular statutory scheme. However, when, as here, Congress does not address the issue directly, general principles of agency and corporate law determine the scope of vicarious liability. Although those principles generally make the corporation itself liable for the unlawful acts of corporate employees, those principles generally shield corporate officers and supervisors from personal liability for the acts of subordinates.

1. Within broad limits, Congress may define the terms under which persons standing in a responsible relation to an actual violator of federal law will be subject to specified sanctions. For example, under the Food Stamp Act of 1977, 7 U.S.C. 2011 *et seq.*, and implementing regulations, a food

store can be permanently disqualified from participation in the food stamp program if its employees traffic in food stamp coupons, even where the store owner and manager have no knowledge of, and did not benefit from, the "trafficking" violation. See 7 U.S.C. 2021(b)(3)(B); 7 C.F.R. 278.6(e)(1)(i). The courts have repeatedly upheld the imposition of liability under this scheme, rejecting a variety of constitutional and other challenges. See, *e.g.*, *Traficanti* v. *United States*, 227 F.3d 170, 174-175 (4th Cir. 2000); *Kim* v. *United States*, 121 F.3d 1269, 1272-1275 (9th Cir. 1997); *Bakal Bros.* v. *United States*, 105 F.3d 1085, 1088-1090 (6th Cir. 1997); *TRM, Inc.* v. *United States*, 52 F.3d 941, 944-947 (11th Cir. 1995); *Freedman* v. *Department of Agric.*, 926 F.2d 252, 254-262 (3d Cir. 1991). If Congress has specified the circumstances under which persons other than the actual violator may be held liable for particular statutory breaches, there is no need to resort to general agency principles.

2. Even where Congress has not addressed the question directly with respect to a particular cause of action, it is a core principle of agency law that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment," as well as for torts committed outside the scope of employment where the servant "is aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency § 219(1) and (2)(d) (1957). Liability under those principles does not ordinarily require proof that the employer knew of or intended the wrongful conduct, or that the employer was negligent in failing to prevent it from occurring. See, *e.g.*, *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 761 (1998) (explaining that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, or should have known, or approved of the supervisor's actions," and endorsing those holdings as correct applications of agency principles) (quoting *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 70-71 (1986)); *Cantrell* v. *Forest City Pub. Co.*, 419 U.S. 245, 253 (1974) (publisher was liable "under traditional doctrines of *respondeat superior*" for defamatory article written by employee within the scope of his employment, even though "there was no evidence that [the publisher] had knowledge of any of the inaccuracies contained in [the] article"); *Railroad Co.* v. *Hanning*, 82 U.S. (15 Wall.) 649, 657 (1872) ("The rule extracted from the cases is this: The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of.").

3. In the corporate context, those principles generally make the corporation itself liable for the unlawful acts of corporate employees performed in the course of corporate duties. On the other hand, an individual corporate officer or supervisor is not subject to vicarious liability for torts committed by subordinate employees. See 3A *Fletcher Cyclopedia of Corporations*, § 1137, at 300 (1994) ("an officer who takes no part in the commission of the tort is not personally liable to third persons for the torts of other agents, officers or employees of the corporation"). The corporate entity constitutes the principal, and officers and supervisors are agents of the principal, as are the subordinate employees. See Restatement (Second) of Agency § 358, cmt. a (1957) ("The doctrine of respondeat superior does not apply to create liability against an agent for the conduct of servants and other agents of the principal appointed by him, even though other agents are subject to his orders in the execution of the principal's affairs."); *Rosenthal & Co.* v. *Commodity Futures Trading Comm'n*, 802 F.2d 963, 967 (7th Cir. 1986) (the doctrine of respondeat superior "is a doctrine about employers and * * * other principals. It has no application to a case where A, B's supervisor, is sued

because B commits a tort."); *Jones* v. *City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (citing cases).

The rule that an individual officer or supervisor is not liable for the torts of subordinates follows from the nature of the relationships among the employee, supervisor, and corporation. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 392 (1982) (quoting Restatement (Second) of Agency § 1 (1957)). An individual corporate officer or supervisor may have the authority to direct or control a subordinate employee, but the subordinate does not stand in a "fiduciary relation" to the officer or supervisor or act "on his behalf." Rather, the subordinate owes a duty of loyalty to the corporate employer itself rather than to any individual within the corporate hierarchy.

An individual officer or supervisor, however, still faces direct liability for the consequences of his own derelictions. Thus, a person who directs another to perform a tortious or otherwise wrongful act is generally liable for any resulting harm. See Restatement (Second) of Agency §§ 212, 344 (1957). That principle "is not dependent upon the law of agency but results from the general rule * * * that one causing and intending an act or result is as responsible as if he had personally performed the act or produced the result." *Id.* § 212 cmt. a.

Finally, although an officer or "a shareholder—even a single shareholder—is normally not liable for the torts of the corporations it holds," *Roe* v. *Sewell*, 128 F.3d 1098, 1103 (7th Cir. 1997); accord *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998), there is an important exception to principles of limited liability. It is a "fundamental principle of corporate law * * * that the corporate veil may be pierced and the

shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes." *Bestfoods*, 524 U.S. at 62.

B. Neither The Text Of The FHA, Nor HUD's Implementing Regulations, Reflect An Intent To Depart From General Agency And Corporate Law Principles Governing Vicarious Liability

The court of appeals acknowledged in this case that "officers and shareholders of a corporation generally enjoy immunity from liability for corporate acts." Pet. App. 6. Relying on "the compelling policy of the FHA," however, the court nevertheless "conclude[d] that a corporation and its officers may be held liable for their failure to ensure the corporation's compliance with the FHA, whether or not the officers directed or authorized the particular discriminatory acts that occurred." *Ibid.* The court explained that "[t]he overriding societal priority of the FHA indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and to ensure that similar harm will not occur again. When one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden." *Id.* at 7. The court of appeals also relied in part on former 24 C.F.R. 103.20 (1999), a HUD regulation, which the court construed to impose potential liability upon "any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling." Pet. App. 14.

The thrust of the court of appeals' analysis was that, even if petitioner would not be vicariously liable for Crank's alleged misconduct under generally applicable agency and corporate law principles, a different and more expansive rule of vicarious liability applies under the FHA. See Pet. App. 2 ("Although under general principles of tort law corporate

shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the Fair Housing Act [are] different."). Neither the statutory text and purposes, nor HUD's regulatory scheme, supports that conclusion.

1. *The Text Of The FHA Does Not Reflect Any Deviation From General Principles Of Vicarious Liability.*

The court of appeals did not identify any provision of the FHA that manifests a congressional intent to depart from usual rules of corporate and agency law. The Act makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(b). The Act further provides that "[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. 3605(a). The FHA defines the term "person" to include "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries." 42 U.S.C. 3602(d). The Act does not, however, specifically articulate the standards to be applied to determine whether a particular individual or other legal entity may be held accountable for a particular violation. Nor, more particularly, does the Act address the circumstances, if any, when one person may be individually liable for the violations of another.

Under background principles of agency, there is generally some scope for such indirect or vicarious liability. See pp. 10-11, *supra*. It is clear, for example, that Triad, as Crank's principal and employer, could be held liable for Crank's unlawful actions. The text of the FHA does not suggest that those background rules should be disregarded. Indeed, the language of the FHA expressly contemplates that principals will be held liable for their agents' actions in some circumstances. By including "corporations, partnerships, [and] associations," within the definition of "person[s]" prohibited from discriminating, Congress made clear that FHA liability may properly be imposed on artificial legal entities that are capable of acting *only through* the agency of others.

By the same token, however, nothing in the FHA suggests that courts should apply an unusually *expansive* conception of vicarious liability in resolving claims brought under the Act. "[A]gainst this venerable common-law backdrop, the congressional silence is audible." *Bestfoods*, 524 U.S. at 62. The most natural inference is that courts in FHA cases should be guided by generally applicable rules of agency and corporate law. Cf. *id.* at 63 ("the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law") (brackets and internal quotation marks omitted).

The court of appeals found a special rule of vicarious liability to be justified by "[t]he overriding societal priority of the FHA." Pet. App. 7. Title VII of the Civil Rights Act of 1964 serves analogous purposes in the context of employment, however, and nonetheless this Court generally has relied on background agency principles in construing Title VII. See, *e.g.*, *Faragher* v. *Boca Raton*, 524 U.S. 775, 793-809 (1998); *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754-

765 (1998); *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 72 (1986). The Court has recognized that occasional departures from background rules of vicarious liability may sometimes be appropriate in order better to serve Title VII's purposes. See *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 544-546 (1999) (concluding that Restatement's rules governing employer liability for punitive damages should be modified so as to encourage employers to adopt antidiscrimination policies and to educate their personnel, thereby furthering the purposes of Title VII); *Faragher*, 524 U.S. at 802 n.3 (Court's task "is to adapt agency concepts to the practical objectives of Title VII"); *Meritor*, 477 U.S. at 72 ("common-law principles may not be transferable in all their particulars to Title VII"). But the fact that the FHA furthers the compelling public interest in preventing and redressing housing discrimination *vel non* does not suggest a congressional intent to undertake wholesale revisions of generally applicable agency and corporate law.

2. HUD's Regulations Incorporate, Rather Than Reject, Traditional Agency Principles.

a. The court of appeals relied in part (see Pet. App. 4-5, 14-15) on former 24 C.F.R. 103.20(b) (1999), which provided that administrative complaints alleging FHA violations may be filed

> against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale * * * of dwellings * * * if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaging, has engaged, or is about to engage, in a discriminatory housing practice.

The court of appeals construed that regulation to mean that where an employee violates the Act, any person who "has the right to direct or control" that employee's conduct is

automatically subject to FHA liability. See Pet. App. 14-15. Such a rule, if it existed, would apply equally to high-level corporate officers intimately involved in all aspects of the business such as petitioner, and to lower-level supervisory employees, even though individual officers and supervisors are not ordinarily subject to vicarious liability for torts committed by others because they do not stand in a principal-agent relationship to the workers they oversee. See pp. 11-12, *supra*. The court of appeals' construction of former Section 103.20(b) is contrary to the text of the rule and to the agency's contemporaneous explanation of its own regulation.

Former Section 103.20(b) subjected a person authorized to direct or control the actions of another to potential FHA liability only "if that other person, *acting within the scope of his or her authority as employee or agent of the directing or controlling person*, is engaged, has engaged, or is about to engage, in a discriminatory housing practice." 24 C.F.R. 103.20(b) (1999) (emphasis added). The underscored language is most naturally construed to incorporate background principles of agency law—and, in particular, to indicate that one person's actual or potential control over another provides a basis for FHA liability only when a principal-agent relationship exists between the two. Cf. *Burlington*, 524 U.S. at 754 (by including "agents" within Title VII's definition of "employer," "Congress has directed federal courts to interpret Title VII based on agency principles").

The court of appeals therefore erred in construing the regulation to establish a blanket rule authorizing the filing of an administrative complaint "against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling." Pet. App. 14. The court of appeals ignored the regulation's further requirement that the person engaged in a discriminatory housing practice must have acted "as employee or agent of the directing or controlling person."

Even when a corporate officer or supervisor is authorized to direct or control the job-related conduct of a line employee, that worker ordinarily remains an "employee or agent" of the corporation itself, not of the individual officer or supervisor. Accordingly, the text of the regulation, when read as a whole, incorporates traditional agency principles.

HUD's contemporaneous explanation of the pertinent rule further clarifies the agency's intent to incorporate, not deviate from, existing agency principles. In 1988, HUD adopted the predecessor to former Section 103.20 (then codified at 24 C.F.R. 105.13) as a final regulation. See 53 Fed. Reg. 24,184, 24,185. In response to an objection to the proposed rule made by the National Association of Realtors, HUD stated that

> it is not HUD's intent to impose absolute liability on any principal; the intent * * * was to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to the liability of a principal for acts of an agent. Any defenses that could be raised in court could also be raised by a respondent to a complaint filed with HUD (see discussion of § 105.18). HUD has revised the language of paragraph (b) of § 105.13 to provide that a complaint may be filed against a directing or controlling person with respect to the discriminatory acts of another only if the other person was acting within the scope of his or her authority as employee or agent of the directing or controlling person.

Id. at 24,185. Thus, in identifying the class of persons against whom administrative complaints could be filed, HUD's intent was to incorporate an existing body of judicially crafted rules, not to promulgate new and distinctive standards of vicarious liability. The 1988 preamble made clear, in particular, that the words "acting within the scope of his or her authority as employee or agent of the directing or controlling person" had been added to the final rule in

order to limit the scope of vicarious liability and to disclaim an "intent to impose absolute liability on any principal." *Ibid.*[3]

b. In 1999, after the events that gave rise to this suit, HUD issued revised regulations governing the processing of administrative complaints under the FHA. See 64 Fed. Reg. 18,538. The reference to persons exercising actual or potential direction or control was moved to 24 C.F.R. 103.202, which currently states:

> **Notification of respondent; joinder of additional or substitute respondents.**
>
> (a) Within ten days of the filing of a complaint * * *, the Assistant Secretary will serve a notice on each respondent by certified mail or by personal service. A person who is not named as a respondent in a complaint, but who is identified in the course of the investigation

[3] In expressing an intent "to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to the liability of a principal for acts of an agent" (53 Fed. Reg. at 24,185), HUD apparently referred to the decisions in *United States* v. *Youritan Construction Co.*, 370 F. Supp. 643, 649 (N.D. Cal. 1973), modified as [to] relief and affirmed, 509 F.2d 623 (9th Cir. 1975); *Northside Realty Assocs.* v. *United States*, 605 F.2d 1348, 1353 n.9 (5th Cir. 1979); *Marr* v. *Rife*, 503 F.2d 735, 740-742 (6th Cir. 1974); *United States* v. *Northside Realty Assocs.*, 474 F.2d 1164, 1168 (5th Cir. 1973); *Moore* v. *Townsend*, 525 F.2d 482, 485 (7th Cir. 1975); *Johnson* v. *Jerry Pals Real Estate*, 485 F.2d 528, 531 (7th Cir. 1973); *Dillon* v. *AFBIC Dev. Corp.*, 420 F. Supp. 572, 579 (S.D. Ala. 1976); and *United States* v. *Real Estate Dev. Corp.*, 347 F. Supp. 776, 785 (N.D. Miss. 1972). See 49 Fed. Reg. 40,529 (1984) (notice of proposed rulemaking) (citing cases). Although each of those cases recognizes that principles of vicarious liability apply to suits under the FHA, the decisions taken together cannot be said to reflect a judicial consensus regarding the precise application of those principles. Several of the cases deal with the liability of the corporate employer rather than of individual officers or supervisors. None holds in terms that background rules of agency should be disregarded in adjudicating claims under the FHA.

> * * * as a person who is alleged to be engaged, to have engaged, or to be about to engage in the discriminatory housing practice upon which the complaint is based may be joined as an additional or substitute respondent by service of a notice on the person under this section within ten days of the identification.
>
> (b) The Assistant Secretary will also serve notice on any person who directs or controls, or who has the right to direct or control, the conduct of another person who is involved in a fair housing complaint.

24 C.F.R. 103.202; see 64 Fed. Reg. at 18,541.[4]

Although current Section 103.202 is not limited by its terms to situations in which a subordinate has "act[ed] within the scope of his or her authority as employee or agent of the directing or controlling person" (and is therefore, if anything, broader than the previous regulation on which the court of appeals relied), the 1999 regulatory amendment was not intended to expand liability or effect a departure from background agency principles. First, HUD made clear at the time of the revision that its intent was to rewrite the pertinent regulations "using plain language" (64 Fed. Reg. at 18,538), and that the new "rule does not make substantive changes to the regulations. All procedures and requirements for filing housing discrimination complaints remain as they are currently." *Id.* at 18,539.

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[4] In the petition for certiorari (at 9-10), petitioner chided the court of appeals for relying on the superseded former 24 C.F.R. 103.20(b). In their brief in opposition (at 11 n.2), respondents pointed out that the "direct or control" language previously contained in former Section 103.20(b) has been moved to a different regulatory subsection rather than eliminated altogether. Petitioner nevertheless continues to assert (Br. 20) that the 1999 regulatory amendment "completely abolish[ed] any reference to liability of 'any person' with 'the right to direct or control the conduct of another person' with respect to housing as subject to a claim."

Second, HUD's regulations continue to provide (albeit in a different regulatory subsection than before the 1999 amendments) that "[t]he respondent may assert any defense that might be available to a defend[a]nt in a court of law." 24 C.F.R. 103.203(a). That would include a defense that the person sued has committed no violation of the Act and bears no indirect liability for anyone else's violation.

Third, current Section 103.202(b) does not say that "any person who * * * has the right to direct or control, the conduct of another person," will automatically be liable for the other person's FHA violations. Rather, it provides that where an individual is alleged to violate the FHA, "[t]he Assistant Secretary will also serve notice" of the complaint on any person authorized to direct and control the alleged violator. 24 C.F.R. 103.202(b). The rule thus identifies a broad class of persons who may be *potentially* liable under the Act, and are therefore entitled to receive notice of a pending proceeding, rather than articulating a test for determining *actual* liability.[5]

---

[5] Requiring that notice of a complaint be served on a broad class of persons makes particular sense in light of the purposes of the administrative complaint procedure. This Court has described the complaint procedure under the FHA as "a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 104 (1979); see 53 Fed. Reg. at 24,184 (administrative complaint procedures are used "to make a determination to resolve matters raised in complaints and to try to eliminate and correct alleged discriminatory housing practices by informal means"). Thus, at least in many instances, the point of the administrative complaint mechanism is not so much to assign blame for past violations as to devise pragmatic strategies to ensure compliance with the Act on a prospective basis. For that purpose it makes particularly good sense to provide notice in the administrative process to persons (such as supervisors and individual corporate officers) who are authorized to direct and control the actual violator, even when their relationship to the violator may not give rise to vicarious liability for prior wrongs.

c. HUD's regulatory approach is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). HUD is charged by Congress with the administration and enforcement of the FHA, and the Secretary of HUD is responsible for promulgating regulations to carry out the purposes of the Act. See 42 U.S.C. 3608, 3612, 3614a. Perhaps the agency could permissibly have determined, with respect to the scope of vicarious liability under the FHA, that significant departures from background agency and corporate law principles were warranted. But, in the absence of statutory language addressing the question, HUD's decision to incorporate generally applicable rules of vicarious liability was surely reasonable. Cf. *Edelman* v. *Lynchburg College*, 122 S. Ct. 1145, 1151-1152 (2002) (Equal Employment Opportunity Commission acted reasonably in adopting "relation back" rule that was consistent with traditional practice).

II. FURTHER PROCEEDINGS ARE WARRANTED TO DETERMINE WHETHER PETITIONER IS SUBJECT TO PERSONAL LIABILITY UNDER CORPORATE VEIL-PIERCING PRINCIPLES

For the reasons stated above, the court of appeals erred in construing the FHA and implementing regulations to establish a distinctively broad rule of vicarious liability. Nevertheless, the court of appeals' *judgment*, which reversed the district court's dismissal of respondents' claims and remanded the case for further proceedings, should be affirmed. Even under general principles of agency and corporate law, respondents may be able to establish petitioner's personal liability for Crank's alleged unlawful conduct. Accordingly, a remand is appropriate to consider petitioner's liability, not under a distinct, FHA-specific rule of vicarious liability, but under traditional principles of agency and corporate law.

A. The general rule that corporate stockholders are not personally liable for wrongs committed by the corporation's

employees (see p. 12, *supra*) is subject to well-recognized exceptions. Thus, under established corporate law principles, "the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes." *Bestfoods*, 524 U.S. at 62; accord, *e.g.*, *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983) (Court "has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies"). As with the statute at issue in *Bestfoods*, "[n]othing in [the FHA] purports to rewrite this well-settled rule." *Bestfoods*, 524 U.S. at 63. "[T]he failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *Ibid.* (brackets and internal quotation marks omitted). Thus, if respondents can establish the prerequisites for piercing the corporate veil, petitioner may be held personally liable for Crank's alleged FHA violations.

"The alter ego doctrine states that, when the corporation is the mere instrumentality or business conduit of another corporation or person, the corporate form may be disregarded." 1 *Fletcher Cyclopedia*, *supra*, § 41.10, at 568; see *Chicago, Milwaukee & St. Paul Ry.* v. *Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 500-501 (1918) (rule that one corporation's ownership of stock in another does not generally "create the relation of principal and agent or representative between the two" is inapplicable "where stock ownership has been resorted to * * * for the purpose * * * of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies"). As the Tenth Circuit has explained,

> the federal common law doctrine of piercing the corporate veil under an alter ego theory can best be described by the following two-part test: (i) was there such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct, and (ii) would adherence to the corporate fiction sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

NLRB v. *Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993); accord 1 *Fletcher Cyclopedia*, *supra*, § 41.30, at 619.

B. Based on the allegations in respondents' complaint and the evidence adduced to this point, petitioner is potentially subject to FHA liability under established veil-piercing principles.[6]

1. Respondents may be able to establish the requisite "unity of interest" between petitioner and Triad. Respondents' complaint alleged that "[a]t all times relevant herein, the Triad real estate firm was owned and operated by [petitioner], who served and continues to serve [as] its president and designated officer/broker." J.A. 7. Although petitioner claims to have transferred ownership of the corporation to Crank in 1995, the court of appeals found that a genuine

[6] Petitioner asserts that respondents "have made no claim that the corporate veil should be pierced, nor did they offer any evidence to support such a claim." Pet. Br. 19. That is incorrect. In arguing that petitioner was potentially liable under the FHA in his capacity as sole shareholder of Triad (Resp. C.A. Br. 45-46, 56-59), respondents asserted that their "evidence would show that [petitioner] is the *sole* shareholder of Triad, and thus an argument to pierce the corporate veil would be meritorious." *Id.* at 59 n.17. And for the reasons stated below, the allegations of respondents' complaint and the evidence adduced to date provide sufficient support for a veil-piercing theory to permit this suit to go forward.

factual dispute existed on that point. Pet. App. 9-10 n.4. It appears to be undisputed that petitioner continued to serve as the president of Triad, and as the corporation's designated officer/broker, at the time of the discriminatory conduct alleged in this case.

"[T]he mere fact that all or almost all of the corporate stock is owned by one individual or a few individuals will not afford sufficient grounds for disregarding corporateness." 1 *Fletcher Cyclopedia*, *supra*, § 41.35, at 665-666. Nonetheless, a plaintiff can more readily establish a basic identity of interests between the shareholder and the corporation where ownership is concentrated in a single individual. See, *e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability & the Corporation*, 52 U. Chi. L. Rev. 89, 109-110 (1985) (stating that "[a]lmost every case in which a court has allowed creditors to reach the assets of shareholders has involved a close corporation," and explaining that while sole ownership of a corporation does not in itself warrant piercing the corporate veil, the economic reasons for limited liability for close corporate shareholders are significantly weakened). "When substantial ownership of all the stock of a corporation in a single individual is combined with other factors clearly supporting disregard of the corporate fiction on grounds of equity and fairness, courts have been willing to apply the 'alter ego' or instrumentality theory in order to cast aside the corporate shield and to fasten liability on the individual shareholder." 1 *Fletcher Cyclopedia*, *supra*, § 41.35, at 666-668. And if petitioner is ultimately found to have been Triad's sole shareholder at the time of the alleged violation, his status as Triad's president and designated officer/broker will reinforce the inference that he exercised pervasive control over the corporation's affairs.[7]

[7] The court of appeals suggested that petitioner's status as sole shareholder of Triad would, if proved, be sufficient in and of itself to subject petitioner to personal liability for FHA violations committed by

b. Respondents may also be able to demonstrate that petitioner failed to observe corporate formalities. "In order to avoid the potential for a court to pierce the corporate veil, a corporation must be sure to observe corporate formalities." 1 *Fletcher Cyclopedia*, *supra*, § 41.31, at 635. Petitioner has admitted that between April 1995 and August of 1998, he did not review any Triad paperwork regarding finalized real estate transactions—a clear failure to comply with corporate formalities and state law real estate requirements. C.A. E.R. 70, 207. Respondents have also alleged that "Triad pays its taxes under [petitioner's] identification number" (Pet. App. 10 n.4), an allegation that if proved would indicate that petitioner has failed to treat Triad as a distinct legal entity.

c. Respondents may also be able to establish that adherence to the general rule of limited shareholder liability would produce inequitable results here. In a declaratory judgment action brought by Triad's insurer, the district court held that Triad's insurance policy specifically excluded claims of discrimination in the provision of services. C.A. E.R. 245-259; see Pet. App. 19, 31. Triad itself appears to be without assets. See 02/02/99 Tr. 30, 39. Unless petitioner is subject to personal liability, therefore, respondents may be unable to obtain redress for their injuries even if they prove

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subordinate employees. See Pet. App. 7-11. The Seventh Circuit appears to have reached a similar conclusion. See *City of Chicago* v. *Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1098 (7th Cir.) ("where common ownership and management exists, corporate formalities must not be rigidly adhered to when inquiry is made of civil rights violations"), cert. denied, 508 U.S. 972 (1993); cf. *ibid.* (stressing sole shareholder's pervasive involvement in corporation). Essentially for the reasons stated at pp. 13-22, *supra*, that conclusion is erroneous. Neither the FHA nor HUD's implementing regulations suggest that a distinct, unusually broad rule of veil-piercing applies to claims brought under the Act. Under established principles, petitioner's alleged status as sole shareholder is relevant to, but does not obviate the need for, an analysis of whether to pierce the corporate veil.

a violation of the FHA. Although the insolvency of the corporation does not by itself warrant the imposition of personal liability on the shareholder, inadequate capitalization is another relevant factor in determining whether the corporate veil should be pierced. See, *e.g.*, *Anderson* v. *Abbott*, 321 U.S. 349, 362 (1944) ("An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability.").[8]

Finally, in determining whether adherence to the general rule of limited liability will produce an unjust result, courts will consider whether the individual shareholder bears some personal responsibility for the breach with which the corporation is charged. See *Greater Kansas City Roofing*, 2 F.3d at 1053 ("the individual who is sought to be charged personally with corporate liability must have shared in the moral culpability or injustice"). In the present case, petitioner in his role as designated officer/broker is alleged to have acted negligently in his training and supervision of Triad employees. That alleged dereliction may have been causally linked to the FHA violation for which respondents seek redress, and it constitutes a breach of the terms under which Triad was permitted to employ the corporate form in its conduct of real estate transactions. Petitioner's negligent performance of his corporate responsibilities, if proved, would further support a determination that piercing of the

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[8] As one leading treatise explains,

> [i]f a corporation is organized and carries on a business without substantial capital and is likely to have insufficient assets available to meet its debts, it is inequitable to allow the shareholders to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibilities to creditors is an abuse of the separate entity and will be ineffectual to protect shareholders from corporate debts.

1 *Fletcher Cyclopedia*, *supra*, § 41.33, at 648-649 (footnotes omitted).

corporate veil is appropriate to prevent an inequitable result.

d. In *Bestfoods*, this Court noted, but did not resolve, a circuit conflict on the question whether, in resolving claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, "courts should borrow state law, or instead apply a federal common law of veil piercing." 524 U.S. at 63 n.9. Although the FHA does not specify whether state or federal common law veil-piercing standards should apply, a uniform federal standard is appropriate. Cf. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943) (federal courts should establish uniform federal rules of decision when a federal statute is silent as to choice of law and overriding federal interests exist). Unlike (for example) the "custom-made, hand-tailored, specifically negotiated" government loan at issue in *United States* v. *Yazell*, 382 U.S. 341 (1966), the FHA is a "nationwide act of the Federal Government, emanating in a single form from a single source." *Id.* at 348.

The question whether the corporate veil should be pierced in this case is one of derivative liability: the effect of veil-piercing would be to treat petitioner as Crank's principal, so that Crank's alleged discriminatory conduct would be imputed to petitioner. In resolving issues of vicarious liability under Title VII, see *Burlington*, *supra*; *Faragher*, *supra*, this Court did not suggest that the liability of an employer for wrongs committed by the company's employees could turn on state-by-state variations in the law of agency. Rather, the clear import of the Court's decisions is that such questions should be resolved through the application of uniform federal rules. The same approach is appropriate here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
RALPH F. BOYD, JR.
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DAVID K. FLYNN
ANDREA PICCIOTTI-BAYER
Attorneys

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In The

Supreme Court of the United States

DAVID MEYER, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT AND DESIGNATED OFFICER/BROKER OF TRIAD, INC., DOING BUSINESS AS TRIAD REALTORS,

Petitioners,

v.

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, AND BROOKS BAUER, INDIVIDUALLY AND ON BEHALF OF THE GENERAL PUBLIC,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

JUNE BABIRACKI BARLOW, ESQ.
Vice President and General Counsel
Counsel of Record
NEIL KALIN, ESQ.
Assistant General Counsel
CALIFORNIA ASSOCIATION OF REALTORS®
525 South Virgil Avenue
Los Angeles, California 90020-1403
Telephone: (213) 739-8200
Facsimile: (213) 480-7724

Counsel for Amicus Curiae, California Association of Realtors®

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Brodsky, Adamson, Law of Corporate Officers and Directors Section 20.01 8

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California Department of Real Estate, Licensing Statistics for 2002, *available at* http://www.dre.ca.gov/stats02.htm 6

I.

BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the California Association of REALTORS® (hereinafter C.A.R.)[1] submits this brief in support of the petitioner David Meyer.

II.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

C.A.R. is a non-profit, voluntary, real estate trade association incorporated in California whose members consist of local Boards and Associations of REALTORS®, and approximately 100,000 persons licensed as real estate brokers and salespersons by the State of California, as well as affiliate members such as real estate appraisers, title insurers, mortgage lenders, and real estate attorneys. C.A.R. is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and licensed real estate activity.

Race discrimination and unfair housing practices are societal evils of the first magnitude, and C.A.R actively

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[1] The parties have consented to the filing of this brief. The letter of consent is on file with the Clerk of the U.S. Supreme Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

works through its Equal Opportunity-Cultural Diversity Committee to design, promote and implement programs in the areas of minority outreach, fair housing, affirmative marketing, fair lending practices and cultural awareness. But it is important to recognize that the issue in this case is not whether or not and to what extent racial discrimination in housing transactions should be illegal. Rather, the question is simply whether Congress intended to use the Fair Housing Act to punish individual owners, shareholders or broker-officers of a real estate corporation for such discrimination based solely on that individual's status in the corporation.

As the real estate trade association for REALTORS® in California, C.A.R. has extensive knowledge about the licensing and business structures of brokers and salespersons in California. While specific state laws and regulations may vary, the essence of a real estate practice in California is typical of other jurisdictions. C.A.R. believes it can provide the Court with information about these structures that will illustrate how the Ninth Circuit's interpretation of the Fair Housing Act disregards traditional corporate law principles, relating to individual responsibility of officers and shareholder owners, but also is incompatible with licensing structures in California and throughout the country.

Finally, should the Ninth Circuit's interpretation of the Fair Housing Act stand, C.A.R. believes it will be a practical impossibility for real estate broker/officer/owners to meet the new standard. Therefore, to avoid personal liability, the real estate industry will engage in a massive restructuring to shield the broker/officer/owners from personal liability. Such an upheaval is not required by the Fair Housing Laws, nor is it necessary or desired to

enforce the laudable objectives of those laws. C.A.R.'s knowledge of the practical aspects of the real estate business may be of assistance to the Court in understanding the adverse consequences of the Ninth Circuit's erroneous interpretation of the fair housing laws in everyday real estate brokerage.

III.

CASE SUMMARY

Respondents Holleys, who were potential buyers of a home, allege that an individual real estate salesperson (Crank) working for a real estate broker corporation (Triad, Inc.) unlawfully discriminated against the Holleys in their efforts to buy a home by uttering racial epithets and by not presenting an offer to the seller/developer of the home they wanted to buy. The seller/developer, as a result, did not sell the property to the Holleys. Both the Holleys and the seller/developer brought suit alleging unlawful discrimination against Crank and Triad, Inc. Attempting to maximize chances of monetary recovery, the Holleys later expanded their suit to include defendant David Meyer, the sole owner and officer of Triad, Inc., in his individual capacity. The District Court dismissed the claim against Meyer, concluding that Crank's discriminatory acts could be imputed to Triad but not to Meyer as an individual. The Holleys appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit sidestepped well-established corporate law and used an expansionist construction to hold that the federal Fair Housing Act makes Meyer, due to his position as an owner and officer of the corporate brokerage firm, personally liable for fair housing violations

committed by an employee of a corporation he owned. To do this, the Ninth Circuit Court of Appeals relied on an outdated regulation issued by the Department of Housing and Urban Development to broaden the scope of the fair housing law well beyond, if not in contradiction to, established law in other circuits.[2] The holding exposes those who own a corporation to individual liability absent personal involvement. The Ninth Circuit opinion does not include an analysis of the traditional rules governing personal liability of corporate directors, officers or shareholders, and indeed flatly disregards these rules in order to reach its novel, and wholly unjustified, construction of the FHA.

Meyer petitioned this Court for Writ of Certioriari and the Petition was granted by the Court on May 20, 2002.

IV.

THE CORPORATE FORM IS A WELL-ESTABLISHED, COMMON AND BENEFICIAL FORM OF BUSINESS ORGANIZATION IN THE CALIFORNIA REAL ESTATE MARKET WHICH IS REFLECTED IN THE LICENSING STRUCTURE.

Most real estate brokerage activities performed on behalf of others in California require a real estate broker's license from the California Department of Real Estate ("DRE").[3] In California, either an individual or a corporation

[2] For a detailed discussion distinguishing the applicable cases, see Petitioner's brief on the merits and the brief, *amicus curiae* of the National Association of REALTORS®.

[3] California Business and Professions Code, section 10130.

may hold a broker's license.[4] A corporation may hold a real estate brokerage license providing it designates a person who has all the qualifications of a licensed broker as a real estate officer who can act on behalf of the corporation.[5] This person, the corporate broker-officer, must complete the same education requirements as any other broker.[6] The officer of the corporation is licensed only to act as a licensed real estate broker for and on behalf of the corporation as an officer.[7] The corporate entity itself conducts the brokerage activity and holds the separate corporate license. In contrast, only a natural person may hold a salesperson's license.[8] A licensed real estate salesperson may not work independent of a broker,[9] but is licensed to act only through one broker, whether that broker holds a corporate or an individual broker's license.

If a corporation, through its agents and officers violates the real estate licensing law, the California Department of Real Estate may revoke the entity's license. Corporate officer licenses, individual broker licenses and individual salesperson licenses may also be revoked. When it publishes the range of discipline imposed, the DRE even identifies these various types of licenses: real estate corporation (REC), real estate officer (REO), real estate broker (REB) and real estate salesperson (RES). The

[4] California Business and Professions Code, sections 10131, 10211, 10158.

[5] California Business and Professions Code, section 10211.

[6] California Business and Professions Code, section 10171.5.

[7] California Business and Professions Code, section 10159.

[8] California Business and Professions Code, section 10132.

[9] California Business and Professions Code, section 10132.

discipline will attach to the specific type of licensee whether it is an entity, or an individual, depending on the specific actor for the relevant violation.

Structuring a California real estate brokerage business as a corporation is a common phenomenon. In California alone there are more than 15,000 corporate real estate broker licensees and just over 17,000 individuals licensed as corporate broker-officers. Furthermore, 94,000 individuals licensed as real estate salespersons work for a corporate broker.[10] According to the California Department of Real Estate website,[11] as of March 2002 there were 107,664 real estate broker licensees and 208,835 real estate salesperson licensees. Thus, even though corporate licensees represent only 14% of all licensed brokers in California, a full 45% of all real estate salespersons work for these corporate brokers. Accordingly, the decision by the Ninth Circuit has the potential not only to affect the 17,000 corporate broker-officers but also nearly half of all real estate salespeople in California.

Thus, Meyer established a business using the same structure as thousands of other real estate businesses. The corporate real estate structure is not being used by errant real estate officers and owners for the sole purpose of shielding themselves from liability but because it is a valid, well recognized structure that has been developed

[10] Telephone Interview with Thomas Hensley, Licensing Manager, California Department of Real Estate (December 11, 2001).

[11] California Department of Real Estate, Licensing Statistics for 2002, *available at* http://www.dre.ca.gov/stats02.htm.

over decades and has been recognized by the real estate licensing authority.

V.

THE NINTH CIRCUIT ERRONEOUSLY DISREGARDED THE CORPORATE FORM WITHOUT ANY LEGAL JUSTIFICATION.

The Fair Housing Act holds those who discriminate accountable whether they be a sales person, the corporation or other persons who were specifically involved in the act. If the corporate owner or officer is guilty of direct violations, the law reaches that wrongdoer as well.[12] As with any corporation, a real estate firm is ordinarily vicariously liable for the unlawful conduct of real estate salespersons in its employ, including the wrongful discriminatory acts alleged here.[13] Those are not the issues in this case.

A corporation is a well-established business entity that is recognized and sanctioned by the State of California as a valid business structure in the real estate brokerage business; it is also incorporated into the state's licensing scheme. Through the years, the courts and state statutes have established core laws governing when the corporation itself is responsible and when officers and shareholders are responsible. The corporation takes on the

[12] *Hobson v. George Humphreys, Inc.*, 563 F.Supp. 344 (W.D. Tenn. 1982).

[13] *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986). Marsh's California Corporation Law, Section 9.29 at 652 (3d Ed. Supp. 1993).

liability for agents acting within the course and scope of their employment. A shareholder, on the other hand, may not be reached personally unless there is specific action on the part of that individual violating laws or other specific duties, or the corporation has not respected the requisite corporate formation, record keeping, and capital requirements. The officers, likewise, are not held personally liable except in extraordinary circumstances in which the officer directly acted, or was otherwise specifically involved with the deed. These rules could be altered by statute but rarely, if ever, are. And when they are, it must be explicit. However, the Fair Housing Act did not alter these fundamental corporate principles and the Ninth Circuit erred in holding that it did.

In real estate, as in other businesses, the corporate structure advances the interests of owners by reducing the risk associated with business. Rather than risk being unlimited, and thus threatening and intimidating to large and small investors alike, the corporate entity makes the risk limited and thus more inviting.[14] The investor knows that if the corporation incurs liability, the maximum loss exposure is the money placed into the business venture (and lost profits and opportunities associated therewith). The officer understands that if the corporation incurs liability, the officer's job, income, reputation and perhaps immediate livelihood can be lost. The possible personal toll on the officer or investor can indeed be significant. However, both officer and investor expect that their personal assets, such as their own home and savings, will not be

[14] *See* Brodsky, Adamson, Law of Corporate Officers and Directors Section 20.01.

subject to attack and attachment. That expectation is backed by the force of law: well-established rules governing the corporate structure and shareholder and officer liability in corporations.

The corporation does not have a definite life span, like that of an individual, that can be interrupted at any time. It has the advantage of being able to combine assets invested by many rather than the possibly limited assets of an individual or few partners. Corporations can raise additional monetary capital that may not be available to an individual. The benefits of the corporate structure are well known and have been balanced over the years against the issue of personal responsibility for corporate officers and shareholders. These individuals may not be reached unless the corporate structure itself fails, the individuals were personally involved in the illegal acts, or there is a specific statute that imposes personal liability. None of these exceptions applies in this case. The language of the Fair Housing Act does not impose such liability, and the legislative history lends no support to the personal liability issue.[15] Absent specific congressional mandate or authority under FHA, the Ninth Circuit summarily dismissed the bedrock laws of personal liability for corporate officers and shareholders to create a real estate law exception that is plainly erroneous and must be reversed.

The decision below sweeps aside the well-established methods of examining the corporation's validity and holds that, as a matter of law, the person who is the sole owner and corporate broker-officer of a real estate brokerage

[15] *See Amicus* Brief of the National Association of REALTORS®.

corporation is personally responsible for acts of the salespersons simply because it is possible that the broker *could* exercise supervision over the offender. Even though there is no allegation of personal knowledge or involvement, the Ninth Circuit has deemed this tenuous connection sufficient under the federal fair housing laws to reach the owner and officer directly and personally for acts of which he is unaware and did not assist in perpetrating.

In this case, the Ninth Circuit failed to discuss, or even identify, any of the traditional bases to disregard the corporate entity – to pierce the corporate veil, so to speak – and extend liability to Meyer as an individual – who is an owner and officer of Triad, Inc. There is no evidence that the corporate entity was established to perpetuate a fraud, circumvent a statute, evade contractual obligations, or accomplish a wrongful act. There is no evidence that the corporation is inadequately capitalized to engage in the real estate business. There is no evidence, through either words or actions that the separate identities of Triad, Inc., the corporation, and Meyer, the individual, have ceased to exist.[16]

The Ninth Circuit seemed concerned that broker-officers might not take steps to supervise real estate salespersons to ensure that they act in compliance with the FHA. But the FHA simply does not create such supervisory duties; it makes unlawful actual discriminatory

[16] B.E. Witkin, Summary of California Law, Corporations, section 12 (9th Ed. 1989).

conduct. In any event, applicable state law in this case supplies the very protections that the Ninth Circuit improperly imported into the Fair Housing Act. And those protections, in the form of a duty of reasonable supervision, are much more likely to deter discriminatory conduct than the amorphous "right to control" test.

In California, the broker-officer has a duty to exercise *reasonable* supervision over the activities of his or her salespersons.[17]

Reasonable supervision includes, as appropriate, the establishment of *policies, rules, procedures and systems* to review, oversee, inspect and manage:

(a) Transactions requiring a real estate license.

(b) Documents which may have a material effect upon the rights or obligations of a party to the transaction.

(c) Filing, storage and maintenance of such documents.

(d) The handling of trust funds.

(e) Advertising of any service for which a license is required.

(f) Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination.

(g) Regular and consistent reports of licensed activities of salespersons. The form and extent

[17] California Business and Professions Code, section 10159.2; California Code of Regulation, title 10, section 2725.

> of such *policies, rules, procedures and systems* are to take into consideration the number of salespersons employed and the number and location of branch offices. The broker shall establish a system for monitoring compliance with *such policies, rules, procedures and systems*. A broker may use the services of brokers and salespersons to assist in supervision so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker (*emphasis added*).[18]

To put these obligations that might satisfy the duty of a broker-officer to reasonably supervise a real estate office in context, one needs to first understand that a real estate brokerage business is a uniquely personal business.

A closer look at the industry will help explain its personal nature. Brokers, through their real estate agents, meet with buyers and sellers, sometimes in person, often times at the real property in question, and sometimes over the phone to establish relationships. Only through these relationships is a real estate transaction begun, often kept together, and sometimes undone. Real estate people do not just work in an office from 9:00am to 5:00pm. Real estate people work in the office, out of their homes, out of their client's homes, from their cars, at escrow and title offices, over breakfast, lunch and dinner, with their office phone, with their home phone, with their cell phone, from a desk, from the hood of their car, during the week, during the weekend, morning, noon and night. Wherever people

[18] *Id.*

(clients, affiliates, etc.) are and at whatever time, a real estate salesperson has to be available. As a result, whether a corporate broker employs one salesperson or one thousand, since it is impossible for an owner or officer to be at all places at all times, one must rely on policies, rules, procedures and systems to prevent wrongful conduct.

Licensed brokers, whether they are corporations, officers or individual brokers are required to exercise this supervision. But the Ninth Circuit would transfigure this requirement into strict liability under the Fair Housing Act for those diligently fulfilling this duty of supervision over salespersons imposed by the state licensing laws.

VI.

SWEEPING ASIDE THE RULES OF PERSONAL LIABILITY FOR OFFICERS AND SHAREHOLDERS UNDER THE FAIR HOUSING ACT WILL CAUSE UNNECCESSARY RESTRUCTURING OF THE REAL ESTATE INDUSTRY WITHOUT ANY CORRESPONDING BENEFIT.

If this Court upholds the Ninth Circuit ruling, corporate broker/owners under the state's licensing structure will have a dilemma: not using the legitimate corporate structure at all and losing all the benefits thereto, or attempting to use the corporate structure and exposing the owner and corporate officer to personal liability for all acts of those persons working for the corporation, whether or not the owner and officer had knowledge of the illegal act, permitted it to occur, properly educated the salesperson or took reasonable steps to reduce the risk that improper conduct would take place.

Thousands of broker-officers currently complying with the state's licensing requirements that a broker oversee corporate real estate activities would be at personal risk under the fair housing laws. Corporate owners and officers would be forced to reconsider their business structure rather than put all personal assets at risk for conduct outside their personal control. The impact of the ruling, in California alone, could reach thousands of real estate broker licensees, tens of thousands of real estate salesperson licensees and hundreds of thousands of individuals that they represent. Those most closely associated with their own business may decide it is no longer prudent to be the sole shareholder or to act as a broker-officer for their own firm; others will be appointed or hired in their place.

In other words, to protect themselves from the potential personal legal liability stemming from the ruling, corporate owners will likely consider an organizational structure that isolates the owner and officer from the business; one that creates distance and barriers rather than involvement. By creating distance between owners or officers and salespeople, reaction time to problems that could be resolved is slowed. By creating distance between a designated broker and policy-setting authority that may reside with the owners or officers of the corporate entity, the designated broker's ability to create options for resolving problems or increasing business may be stymied. This upheaval is not necessary and does not serve any public benefit. But it would be a direct result of affirming the Ninth Circuit's new expansion of the Fair Housing Act.

The Fair Housing Act does not address restructuring the corporate rules. To deny owners and officers of real estate corporations the benefits of limited liability creates a tremendous disincentive to incorporate. It also would

give any broker pause to consider supervising salespersons at all, owning a real estate company or serving as the broker/officer for a real estate company. The societal advantages of a corporate structure to owners, investors, officers and consumers have been established for years. Brokers that also own closely held businesses as corporations, or act as corporate officer, should have the same benefits of these corporate structures that other businesses enjoy outside the real estate industry. Sweeping aside corporate structure rules of liability of shareholders and officers without specific language in the Act authorizing such an expansive reach is without legal justification.

The Ninth Circuit improperly imports (and expands) the state licensing laws into the federal fair housing law. The Ninth Circuit seemed to assume that those licensing laws create the very same liability as the court erroneously derived from an outdated HUD regulation. But under the state licensing laws, the right to direct or control does not automatically equate to liability; before liability may exist there must first be a *breach* of the duty to direct or control. Thus, the court's conclusion is not consistent with the state laws governing personal liability of corporate officers and shareholders upon which it relied. More importantly, these state laws simply cannot *create* liability under the Fair Housing Act.

The Ninth Circuit opinion assumes that a corporate owner, officer or broker-officer has personal liability for acts of salespersons working for the corporation because of general supervisory responsibilities imposed upon the corporate owner, officer or broker-officer. In essence, the position itself exposes the individual owner or officer to liability, not any act of the individual. Under this break from corporate law, the ruling puts the corporate broker/officer

personally at risk for an activity not within his control even if he *had* done everything in his control. Further, the Fair Housing Act does not attach vicarious liability to an individual owner or officer, in addition to the corporation, solely because the broker-officer has the *right* to control conduct. It punishes conduct, not the possibility of conduct. This theory of liability by virtue of position creates liability so burdensome and out of step with other corporate formations that brokers will flee from the structure. If such were the intent of Congress, the words supporting this construction would be found in the language itself. It is not.

VII.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

JUNE BABIRACKI BARLOW, ESQ.
Vice President and
General Counsel, SBN 093472
Counsel of Record
NEIL D. KALIN, ESQ.
Assistant General Counsel,
SBN 119920

CALIFORNIA ASSOCIATION OF REALTORS®
525 South Virgil Avenue
Los Angeles, California 90020-1403
(213) 739-8200

Counsel for Amicus Curiae,
California Association of Realtors®

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In The

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

v.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On A Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

JON W. LUTHER
CHRISTOPHER G. SENIOR*
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, DC 20005
(202) 266-8200

Attorneys for Amicus Curiae

* *Counsel of Record*

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City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 2

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Heights Community Congress v. Hilltop Realty, Inc.,
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International Bhd. of Elec. Workers, Local 332 v. Hyland Wilson Elec. Contractors, Inc.,
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Lobato v. Pay Less Drug Stores, Inc.,
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Lowell Staats Mining Co., v. Pioneer Uravan, Inc., 878 F.2d 1259 (10th Cir. 1989) 6, 7

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MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 2

Marks v. Polaroid Corp., 237 F.2d 428 (1st Cir. 1956) ..5

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Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 2

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San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 2

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Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (4th Cir. 1975).....10

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OTHER

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Michael P. Dulin, *Corporate Law: Disregarding the Corporate Entity*, 75 Denv. U. L. Rev. 763 (1998) ...4, 7

John R. Jones, *Personal Liability? Piercing the Corporate Veil,* 44 For The Defense 6, 41 (2002) 7

Wilson McLeod, *Shareholders' Liability and Workers' Rights: Piercing the Corporate Veil Under Federal Labor Law,* 9 Hofstra Lab. L.J. 115 (1991).....11

MIKE E. MILES, et al., REAL ESTATE DEVELOPMENT, PRINCIPLES AND PROCESS 95, 554 (Urb. Land Inst. 3rd ed. 2000).....12

National Association of Home Builders, *Decent Affordable Housing. It's the American Dream* (2001).....13

Endangered Species? Consolidation Tests the Survival Skills of the Large Midsize Builder, Builder, May 2002, at 126.....14

Realty Times Staff, *NAR, NAHB Endorse White House, HUD Minority Housing Initiative* (June 18, 2002).....13

<http://www.centex.com/investor_relations.htm> (assessed July 26, 2002).....14

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies and liabilities under a federal statute that impacts NAHB's members, particularly when any such remedies and liabilities are expanded by a federal court.

NAHB plays an integral role in increasing affordable and mixed-use housing opportunities for all buyers regardless of race, creed, or national origin. Moreover, NAHB is at the forefront of the building industry in increasing minority homeownership and rental opportunities by producing and preserving affordable housing, and through its support of down payment

[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

assistance, single-family affordable housing tax credits, the strengthening of the FHA multi-family insurance program, and the creation of a rental housing production program.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002).

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit disregarded universally accepted principles of corporate law in concluding that an innocent officer and owner of a corporate entity is vicariously liable under the federal Fair Housing Act for the discriminatory acts of an employee of the corporation. The Ninth Circuit's overly broad decision casts a wide net of uncertainty over matters concerning corporate liability, the ramifications of which could harm innocent officers, directors, shareholders, and investors of corporations involved in the vital production of safe, quality housing in the United States.

Discriminatory practices in the sale and provision of housing, while abhorrent, will not be effectively eradicated by holding officers and owners personally liable where they were not aware of, approved, nor had any personal involvement in the tortious conduct of employees or agents of the corporation. Merely being an officer or shareholder of a corporation should not render one personally liable for the discriminatory acts of employees or agents of the corporation, unless facts otherwise dictate such liability, or warrant a piercing of the corporate veil.

The effect of the Ninth Circuit's decision, which improperly expands Fair Housing Act liability, will serve to inhibit the personal involvement and capital investment of the very people whose resources are indispensable to an open and healthy housing market – real estate owners and investors. This Court must reverse the erroneous decision below.

ARGUMENT

I. UNIVERSALLY ACCEPTED PRINCIPLES OF CORPORATE LAW PRECLUDE THE EXTENSION OF PERSONAL LIABILITY TO INNOCENT OFFICERS AND OWNERS OF CORPORATIONS

Well-settled in the law is the notion that personal liability generally does not extend to innocent corporate officers or owners for the wrongful acts of employees of the corporation. The mere fact that one is an officer or agent of a corporation does not warrant holding that individual personally liable for the tortious act of an employee of the corporation. *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 908 (1st Cir. 1980); *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406, 408-409 (10th Cir. 1958). In fact, a contradictory finding defeats the very utility of the corporate form itself, which is to "limit the liability of both the shareholders who comprise it and the directors, officers, and corporate personnel who operate within its parameters."[2]

In a sweeping opinion, the U.S. Court of Appeals for the Ninth Circuit disregarded the traditional underpinnings of corporation law in a search for liability under the Fair Housing Act. *Holley v. Crank*, 258 F.3d 1127 (9th Cir. 2001). The Ninth Circuit clearly recognized that officers and shareholders of a corporation generally enjoy immunity from liability for corporate acts. *Holley*, 258 F.3d at 1132. Nevertheless, the Ninth Circuit found such liability, holding that a corporation and its officers and

[2] Michael P. Dulin, *Corporate Law: Disregarding the Corporate Entity*, 75 Denv. U. L. Rev. 763 (1998).

owners may be held liable for their failure to ensure the corporation's compliance with the FHA, "whether or not the officers directed or authorized the particular discriminatory acts that occurred." *Id.*

Unquestionably, the Fair Housing Act's prohibition on discrimination in housing is imperative in a society that, even in the 21st century, clings to the vestiges of discrimination from a bygone era. However, by imputing personal liability via the Fair Housing Act on a sole owner and officer of a real estate corporation, who was neither aware of, nor authorized the discriminatory actions of his agent, the Ninth Circuit's decision could very well hinder the objective it seeks to achieve.

As other Federal circuits have recognized, personal liability on the part of corporate officers typically involves "instances of direct personal participation, as where the defendant was the 'guiding spirit' behind the wrongful conduct, or the 'central figure' in the challenged corporate activity." *Escude Cruz*, 619 F.2d at 908 (quoting *Marks v. Polaroid Corp.*, 237 F.2d 428, 435 (1st Cir. 1956); *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 605-606 (3rd Cir. 1978)).

The scope of the Ninth Circuit's decision is vast: any officer or owner of a real estate corporation must now expect exposure to unlimited personal liability - no matter how innocent and far removed - virtually as a cost of doing business. The Ninth Circuit certainly realized the magnitude of its reach, deeming it as "... harsh punishment of an otherwise innocent employer." *Holley*, 258 F.3d at 1132. Yet, in a sprint past the language and intent of the Fair Housing Act, the Ninth Circuit chose to extend personal liability where none should have attached. *Id.* at 1135.

Unfortunately for the Respondents, their efforts at seeking redress from the offending agent, and from the corporation, proved unsuccessful. But that fact should not obscure the reality that the Respondents' remedy should have been confined to an action against the offending agent, or the corporation itself. Where there are no facts present that would otherwise mandate an extension of liability to an innocent owner or shareholder, or call for a piercing of the corporate veil, the corporate entity itself is designed to absorb liabilities stemming from the tortious acts of employees, agents, and officers of the corporation. *Lowell Staats Mining Co., v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1263 (10th Cir. 1989). "Generally, a corporation is treated as a legal entity separate from its shareholders to commit limited capital to the corporation with the assurance that they will have no personal liability for the corporation's debts." *Id.* at 1263 (citations omitted).

A. LIMITED EXCEPTIONS THAT MIGHT ALLOW FOR A PIERCING OF THE CORPORATE VEIL ARE NOT PRESENT IN THIS CASE

The standards utilized to pierce a corporate veil[3] vary from state to state and from circuit to circuit; however, a court is most inclined to pierce the veil when a corporation is used "in furtherance of crime, to facilitate

[3] Defined as "[T]he judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." *Black's Law Dictionary* 1168 (7th ed. 1999).

fraud, to justify a wrong, or to defeat public convenience."[4]

In an earlier decision, the Ninth Circuit announced three factors to be used in determining whether or not to pierce the corporate veil: "... the amount of respect given to the separate identity of the corporation by its shareholders, the degree of injustice visited on the litigants by recognition of the corporate entity, and the fraudulent intent of the incorporators." *Board of Trustees v. Valley Cabinet*, 877 F.2d 769, 773 (9th Cir. 1989) (citations omitted).

In addition to the Ninth Circuit, other courts have pierced the corporate veil where the corporate form has been used as nothing more than an instrument to commit fraud, or as a shell[5] and where it is shown that shareholders used the corporate entity "as a mere instrumentality for the transaction of their own affairs without regard to separate and corporate existence, or for the purpose of defeating or evading important legislative policy, or in order to perpetrate a fraud or wrong on another." *Lowell Staats*, 878 F.2d at 1263. In such instances, "equity will permit the corporate form to be disregarded and will hold the shareholders personally liable for the corporation's improper actions." *Id.*

Nowhere in its decision did the Ninth Circuit cite any of these veil-piercing factors. Indeed, the facts of the case simply do not support a claim that the corporate form was ever used as a fraudulent or criminal instrument.

[4] Michael P. Dulin, *Corporate Law: Disregarding the Corporate Entity*, 75 Denv. U. L. Rev. 763 (1998).

[5] *See* John R. Jones, *Personal Liability?-Piercing the Corporate Veil*, 44 For The Defense 6, 41 (2002) (citing *Uchitel Co. v. Telephone Co.*, 646 P.2d 229, 234 (Alaska 1982); *Ross v. Playle*, 505 N.W.2d 515, 517 (Iowa App. 1993)).

Holley v. Crank, 258 F.3d 1127, 1129-1131 (9th Cir. 2001). Even while extending personal liability to Mr. Meyer, the Ninth Circuit went as far as to describe him as an "otherwise innocent employer." *Id.* at 1132. Consequently, the Ninth Circuit had no justifiable basis to view the subject corporate entity as anything other than an independent real estate corporation.

In lieu of a veil-piercing analysis, what the Ninth Circuit did do was impute personal liability under the Fair Housing Act on an otherwise innocent officer and owner. This Court should reverse the decision not because the goals of the Ninth Circuit's ruling, an attempted remedy of a discriminatory housing practice, are not laudable, but because the decision was not grounded in law.

B. THE NINTH CIRCUIT'S DECISION FINDING OFFICER AND OWNER LIABILITY IS NOT SUPPORTED BY THE FAIR HOUSING ACT

Arguably, in finding Petitioner Meyer personally liable under the Fair Housing Act, the Ninth Circuit employed its own type of veil-piercing technique.

In its ambitious search for liability, the Ninth Circuit found it in the "criteria" for the Fair Housing Act:

> "...[T]he criteria for the Fair Housing Act is different as liability is specified for those who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling."

Holley v. Crank, 258 F.3d 1127, 1130-1132 (9th Cir. 2001) (citing 24 C.F.R. § 103.20 (1999)).

As Petitioner Meyer has very aptly pointed out, the Fair Housing Act neither defines, nor purports to expand, the class of persons who can be sued for alleged discriminatory housing practices. Petition for Writ of Certiorari at 9. Moreover, as Meyer also argues, the "criteria" used by the Ninth Circuit, namely a U.S. Department of Housing and Urban Development (HUD) regulation, 24 C.F.R. § 103.20 (1999), was arguably inapplicable to the case because the language relied upon by the Ninth Circuit had been struck from the regulation prior to the Court's ruling. Pet. 9-11.

In a case involving a claim of racial discrimination under the Fair Housing Act, a Federal District Court clearly stated that "no individual may be held vicariously liable simply because she is an officer or manager of the company," and that "... courts apply the doctrine of vicarious liability to the company, not the company's individual officers." *United States v. Lorantffy Care Center*, 999 F. Supp. 1037, 1046 (N.D. Ohio 1998) (citing *Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974)). Additionally, a Federal Court has held that no liability should attach to the officers of a corporation, unless the officer "personally participated in the agent's acts, or knew of and ratified his acts and statements..." *See Heights Community Congress v. Hilltop Realty, Inc.*, 629 F. Supp. 1232 (N.D. Ohio 1983).

Moreover, as the U.S. Court of Appeals for the Fourth Circuit has held in a civil rights action, where a director "does not personally participate in the corporation's tort, general corporation law does not subject

him to liability simply by virtue of his office." *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1142 (4th Cir. 1975). Conversely, proof that a director of a corporation voluntarily and intentionally caused the corporation to act in the commission of a tort is sufficient evidence to make the director personally accountable for the tort. *Id.* at 1145.

Without a clear mandate from the Fair Housing Act, surely an officer or owner who was not aware of, nor ratified or participated in the discriminatory actions of his employees should not be held personally accountable for those actions. Although not a Fair Housing Act case, the First Circuit's logical finding in *Escude Cruz v. Ortho Pharmaceutical* should be adhered to nevertheless:

> "Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation."

619 F.2d 902, 908 (1st Cir. 1980) (citations omitted). By imputing personal liability on Mr. Meyer, via an expansion of the intent of the Fair Housing Act, the Ninth Circuit has bootstrapped onto a legal authority that does not exist.

Congress has enacted measures that provide a vehicle upon which personal liability may attach to otherwise innocent officers or owners of corporations for the wrongful acts of employees or agents. One such

example exists in the area of federal labor law.[6] As a consequence, the Ninth Circuit has previously recognized Congress's intent to expand personal liability and has ruled accordingly. *See, e.g. International Bhd. of Elec. Workers, Local 332 v. Hyland Wilson Elec. Contractors, Inc.*, 881 F.2d 820 (9th Cir. 1989) (stockholders subject to personal liability under federal Labor-Management Relations Act); *Marshall v. Coastal Growers Ass'n*, 598 F.2d 521 (9th Cir. 1979) (incorporators subject to personal liability under federal Farm Labor Contractor Registration Act).

However, the Fair Housing Act, even when construed broadly, was not intended to impose personal liability on an innocent officer or owner of a real estate corporation. Had that been their intent, Congress surely would have amended the law since its original enactment.

Therefore, the remedy for a violation of the Fair Housing Act should be confined to an action against the offending agent or employee, or to the corporate entity itself. The Ninth Circuit's decision is erroneous and should be overturned by this Court.

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[6] *See* Wilson McLeod, *Shareholders' Liability and Workers' Rights. Piercing the Corporate Veil Under Federal Labor Law*, 9 Hofstra Lab. L.J. 115 (1991)

II. IMPOSITION OF PERSONAL LIABILITY ON INNOCENT OFFICERS AND OWNERS OF REAL ESTATE CORPORATIONS WILL INHIBIT THE FUTURE PRODUCTION AND AVAILABILITY OF AFFORDABLE HOUSING STOCK

The Ninth Circuit's ruling extending personal liability to innocent officers and owners of real estate corporations threatens to inhibit the capital investment of myriad owners, builders, and managers of single-family and multi-family housing units in the United States.

For example, a significant amount of the financing for multi-family rental housing stock is pooled via the use of Real Estate Investment Trusts ("REITs").[7] A recent survey of eleven of the largest publicly-traded REITs indicates that over 900,000 residential units are currently owned, in development, or under management, by more than 200,000 shareholders of these REITs.[8] These numbers include only record and beneficial shareholders and do not account for the vast numbers of limited partners and silent partners who invest in, operate, and manage real estate through REITs.

[7] A REIT is an ownership entity that provides limited liability, no tax on the entity, and liquidity. Ownership is evidenced by shares of beneficial interest similar to shares of common stock. REITs were created by Congress to enable small investors to make investments in large-scale, income-producing real estate. *See* MIKE E. MYLES et al., REAL ESTATE DEVELOPMENT, PRINCIPLES AND PROCESS 95, 554 (Urb. Land Inst. 3rd ed. 2000).

[8] Analysis based on review of Securities and Exchange Commission data and research by NAHB Staff (accessed June, 2002) <http.www.sec.gov/edgar/searchedgar/companysearch.html>

Undoubtedly, the Ninth Circuit's extension of personal liability under the Fair Housing Act to officers, directors, and investors in REITs, will serve only to discourage investment in a sorely-needed sector of the housing market – affordable multi-housing. A diminishing level of affordable multi-housing rental units will exacerbate the already "critical housing needs[9]" of the Nation's populace, further hindering the ability of low-to-moderate-income renters to obtain quality housing.

Additionally, in an effort to increase minority homeownership and rental opportunities, home builders en masse have made a commitment to participate in low-income tax credit programs for the production of affordable housing in distressed areas. Specifically, the NAHB has committed to help low-income Americans, particularly minorities, achieve the dream of home ownership by increasing the number of minority home owners by 5.5 million over the next decade.[10]

Were the Ninth Circuit's decision upheld, some of the very same owners, investors, and property managers, who are committed to providing expanded home ownership opportunities for minorities and low-

[9] "Critical housing needs" has been defined as households that spend more than half of income on housing, or which live in substandard conditions. One in every seven renter households, over five million Americans, is included in this group. National Association of Home Builders, *Decent Affordable Housing. It's the American Dream* (2001).

[10] Realty Times Staff, *NAR, NAHB Endorse White House, HUD Minority Housing Initiative* (June 18, 2002). The NAHB strongly endorses the "Renewing the Dream" initiative, a tax credit program announced by the Bush Administration (June 15, 2002) to help low-income Americans, particularly minorities, achieve the dream of homeownership.

income citizens, would be subject to personal liability for the discriminatory acts of "rogue" agents and employees. Not only would the Ninth Circuit's decision not further the goals of equality in homeownership, it would have the debilitating effect of discouraging investment in and production of critically needed housing.

Finally, scores of home builders, including members of the NAHB, are engaged in high production home building, with the top 100 builders closing sales on over 320,000 residential units in 2001. This accounts for over 28 percent of the U.S. for-sale housing market and represents billions of dollars of investment in many of this nation's largest public and privately-traded real estate corporations.[11] In fact, just a sampling of one of the largest high production builders indicates that over 53 million outstanding shares are held by over 800 institutional investors.[12]

Given that thousands of sales agents and management staff are employed by high production builders, the Ninth Circuit's expansion of Fair Housing Act liability could have alarming effects on the owners and investors of these companies. An unauthorized discriminatory act by a single employee, of a staff of tens or even hundreds, puts at risk the officers and owners of a segment of the real estate industry that accounts for more than one-quarter of the for-sale residential housing market.

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[11] *Endangered Species? Consolidation Tests the Survival Skills of the Large Midsize Builder*, Builder, May 2002, at 126.

[12] <http://www.centex.com/investor_relations.htm> (assessed July 26, 2002).

The market segments cited above reflect only a small percentage of the total housing industry, which is projected to construct almost 1.6 million units in 2002. The Ninth Circuit's decision threatens to disturb the flow of investment into this vital industry. Surely, the Fair Housing Act was not intended to provoke such instability in America's housing markets.

CONCLUSION

The National Association of Home Builders respectfully requests that this Court reverse the United States Court of Appeals for the Ninth Circuit and rule that the Fair Housing Act does not extend personal liability to innocent officers and owners of real estate corporations for the unauthorized discriminatory acts of agents and employees of the corporation.

DATED: July 31, 2002

Respectfully submitted,

Jon W. Luther
Christopher G. Senior*
National Association
of Home Builders

*Counsel of Record for
Amicus Curiae

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In the

Supreme Court of the United States

DAVID MEYER,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE National Association of REALTORS® IN SUPPORT OF PETITIONER

LAURENE K. JANIK
Counsel of Record
General Counsel
RALPH W. HOLMEN
Associate General Counsel
NAN ROYTBERG
Associate Counsel
National Association of REALTORS®
430 North Michigan Avenue
Chicago, Illinois 60611-4087
(312) 329-8375

Attorneys for Amicus Curiae
National Association of REALTORS®

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

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NATIONAL ASSOCIATION OF REALTORS®:

Article 10, Code of Ethics 2

BRIEF OF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITIONER DAVID MEYER

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the National Association of REALTORS® ("NAR"), submits this brief in support of the Petitioner, DAVID MEYER.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

NAR is a nationwide, non-profit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. As such, NAR is a champion of the interests of real estate professionals and real property owners throughout the United States.

Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR is concerned with a wide range of activities, including promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 State Associations of REALTORS®, approximately 1,600 Local Associations of

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[1] The parties have consented to the filing of this brief and the letters of consent are filed with the Clerk of the U.S. Supreme Court herewith. Pursuant to Rule 37.6, *amicus curiae* states that counsel for a party did not author this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

REALTORS®, and approximately 795,000 "REALTOR®[2]" and REALTOR-ASSOCIATE® members. Petitioner David Meyer has retired from active real estate practice, but was, at the time of the events at issue in this case, a member of NAR.

INTRODUCTION

NAR has a substantial and long-standing commitment to equal opportunity in housing and fair housing compliance. Pursuant to this commitment and immediately upon the adoption of the Fair Housing Act, 42 U.S.C. §§ 3601-3619, NAR adopted Article 10 of its Code of Ethics which mandated that:

> *The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex or country of national origin. The REALTOR® shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex or country of national origin.*[3]

In 1975, NAR and the U.S. Department of Housing and Urban Development ("HUD") created and adopted a Voluntary Affirmative Marketing Agreement ("VAMA"). The VAMA was the first nationwide program to implement § 809 of the Fair Housing Act, which calls for the Secretary of HUD to "work out programs of voluntary compliance and of enforcement" with persons in the housing industry. 42 U.S.C. § 3609. Renewed in 1981, 1987 and 1992, the VAMA served as the model for agreements subsequently adopted by other segments of the real estate market, including the National Association of Homebuilders, the National Association of

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[2] "REALTOR®" is a federally registered collective membership mark used by members of NAR to indicate their membership status.

[3] Article 10 was amended to add the protected classes of handicap and familial status in 1988.

Real Estate License Law Officials and the American Institute of Real Estate Appraisers. The VAMA was replaced in 1996 with the NAR/HUD Fair Housing Partnership Agreement, which remains in effect today. This Agreement lays out a comprehensive program for NAR and HUD, as partners, to implement their commitment to fair housing.

NAR's concern about the opinion of the Ninth Circuit derives directly from its commitment to Fair Housing Act compliance. The opinion below is of far reaching importance to NAR's many members, as well as hundreds of thousands of incorporated real estate brokerage firms, because it abandons a fundamental tenet of corporate law relied on by many real estate firms. NAR is deeply troubled by the way in which the Ninth Circuit's opinion inappropriately and unnecessarily imposes *personal* liability on owners and officers of real estate brokerage corporations, *solely* as a result of those positions, for discriminatory conduct by the sales agents of such corporations. This conclusion is unprecedented, unsupported by the Fair Housing Act or any other authority, including that cited by the Ninth Circuit, and squarely at odds with existing principles of corporate law and fairness. Any imposition of personal liability should be in accordance with a fault-based standard.

NAR urges this Court to reverse the Ninth Circuit and establish the principle that corporate owners and officers are not, as a consequence of holding those positions alone, strictly liable for the Fair Housing Act violations of corporate agents, but instead may be liable only when they participate in or otherwise are directly responsible for the conduct that constitutes the violation.[4]

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[4] NAR emphasizes that its interest and concern is solely with respect to the Ninth Circuit's holding that Petitioner Meyer is liable for the Fair Housing Act violations of an agent of Triad Realty because he is Triad's shareholder and president. All references in this *amicus* brief

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SUMMARY OF ARGUMENT

This case presents the question "whether . . . owners and officers of (real estate brokerage) corporations are absolutely liable for an employee's or agent's violation of the (Fair Housing) Act, whether or not they personally directed, authorized, or were even aware of the particular acts that occurred." *Petition for Certiorari at i.* This case does *not* raise the issue of whether individuals acting in their capacity as real estate brokers are liable for the Fair Housing Act violations of their agents.

The question for this Court, and that which invokes NAR's concern, is whether Petitioner, as an innocent owner and officer of Triad, is liable under the Fair Housing Act for Crank's misconduct. The Ninth Circuit's holding that Meyer may be liable on the basis of his status as owner and president of Triad Realty, without fault or culpability, is incorrect, and requires reversal by this Court.

First, the starting point for the question presented is, of course, the Act itself. Straightforward examination of the text of the Act, the relevant regulations and the Act's legislative history, reveals that the Act provides no basis whatsoever for holding owners or officers personally liable for discriminatory conduct by agents of such firms.

Second, the principle of "non-delegability" cannot be applied to hold owners or officers personally liable for violations of the Act by their corporation's agents. The Ninth

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to Meyer's liability, or that of owners or officers of real estate corporations generally, should be understood to refer only to liability arising from an individual's position as owner or officer of the corporation and without reference to any personal involvement in allegedly discriminatory conduct. Correspondingly, all references to the holding and conclusions of the Ninth Circuit below refer exclusively to that court's decision as it relates to this issue.

Circuit erred in doing so. Courts have not cited or applied the concept of non-delegability in Fair Housing Act cases in a consistent fashion, with some treating it as little more than another name for the familiar doctrine of respondeat superior, while others correctly apply it as an exception to respondeat superior that disregards whether the agent was acting within the scope of his employment. In either case, however, the non-delegability doctrine applies only to hold a person acting in the capacity of a principal liable for actions of his agent. Accordingly, non-delegability may cause the *corporation* that is the employer of a real estate sales agent to be liable for the agent's violations of the Act. However, non-delegability is simply inapplicable to the owners and officers of the corporation, since they are not principals of the corporation's agents.

Third, traditional corporate law does not dictate a conclusion that owners or officers are personally and strictly liable for the acts of corporate agents. Contrary to the Ninth Circuit's suggestion, there is no basis to apply a different rule in the context of the Fair Housing Act. Courts do not hold corporate owners and officers personally liable for the unlawful conduct of corporate agents with respect to other matters of significant public concern, unless there has been personal involvement. Moreover, existing theories of law afford victims with recourse when corporate agents act wrongfully and corporate owners and officers are truly culpable.

Finally, since neither the Fair Housing Act, the common law, nor the principle of non-delegability provide a basis for owners and officers of incorporated real estate brokerages to be held personally liable for violations of the Act by firm agents, any Fair Housing Act liability of those owners and officers must be based on personal fault. Liability is appropriate where the individuals participated in the alleged discriminatory conduct, or where they bore responsibility or were otherwise culpable for the conduct which allegedly violated the Act.

ARGUMENT

I. Neither the Text of the Fair Housing Act, Its Legislative History, Nor the Regulations Promulgated Pursuant to the Act Provide That an Innocent Owner or Officer of an Incorporated Real Estate Firm Is Strictly Liable for the Fair Housing Violations of the Firm's Agents.

The proper place to begin any inquiry as to whether owners or officers of an incorporated real estate brokerage firm bear personal and strict liability under the Fair Housing Act ("Act") for violations of the Act by employees or agents of the firm is, of course, the language of the Act itself. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Examination of the text of the Act yields nothing to suggest that owners and officers may be held personally liable. The Act prescribes the discriminatory conduct made unlawful under the Act, but does not explicitly identify those who may be liable for violations of the Act. 42 U.S.C. §§ 3604-06. "Respondent" is defined to mean only

> *(1) the person or other entity accused in a complaint of an unfair housing practice; and (2) any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under § 3610(a) of this title.*

42 U.S.C. § 3602.

In short, the Act proscribes conduct without expressly, or even implicitly, suggesting that liability is to be strictly imposed on corporate owners or officers when a corporate employee or agent engages in conduct that violates the Act.[5]

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[5] The Act is silent even as to any fault-based liability of corporate owners or officers, in sharp contrast to the clear intent of Congress with respect to antitrust violations:

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The Act's legislative history is equally silent on the issue. Although both chambers of Congress engaged in extensive and active debate preceding enactment, nothing said by any Member of Congress, nor any portion of the House and Senate reports, suggests any Congressional intent that owners and officers of corporate real estate firms be held liable for violations of the Act, in that capacity alone and without more.[6]

The regulations promulgated by the Department of Housing and Urban Development ("HUD") in connection with enforcement of the Act, 24 C.F.R. §§ 100-103 (2002), likewise do not impose liability for violations of the Act by corporate employees on the shareholders or officers of the corporation. To be sure, the prior version of 24 C.F.R. §103.20(b) (1999), on which the Ninth Circuit relied, in part, did address "Persons

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> Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, . . .

15 U.S.C. § 24. *See also Circle T Corp. v. Deerfield*, 444 P.2d 404, 407 (Colo. 1968), where the statute expressly provided that a person injured by a corporation's breach of fiduciary duty could bring a claim for relief against the corporation and "the designated member or director acting as broker." C.R.S. 1963, 117-1-5(8).

[6] Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81; 113 CONG. REC. H22818-819 (daily ed. Aug. 16, 1967); 114 CONG. REC. H9551-613 (daily ed. Apr. 10, 1968); 114 CONG. REC. S5995-6002 (daily ed. Mar. 11, 1968); Pub. L. No. 100-430, 102 Stat. 1619; 134 CONG. REC. H16475-512 (daily ed. June 29, 1988); 134 CONG. REC. H20910-920 (daily ed. Aug. 8, 1988); 134 CONG. REC. S19870-907 (daily ed. Aug. 2, 1988).

against whom complaints may be filed."[7] For several reasons, however, the Ninth Circuit's reliance on that regulation was erroneous, and this Court should reject any suggestion that the regulation indicates the intent of Congress or HUD that corporate owners and officers be personally liable for violations of the Act by corporate employees or agents.

First, the text of that regulation does not support liability for corporate owners and officers. The Ninth Circuit emphasized the language that permits complaints against any person "who directs or controls, or has the right to direct or control, the conduct of another person" and concluded that David Meyer, as owner and officer, could be personally liable for the conduct of Triad Realty agent Crank. *Holley v. Crank*, 258 F.3d 1127, 1130-31 (9th Cir. 2001) *quoting* 24 C.F.R. §103.20 (1999). Although the court did not expressly state this, it presumably determined that as owner and officer, Meyer controlled, or had the right to control, Crank. But the court ignored the language following that which it quoted. That language further requires that the "other person" (that is, the individual actually engaged in discriminatory conduct) be "acting within the scope of his or her authority *as employee or agent of the directing or controlling person. . . .*" (Emphasis added.) 24 C.F.R. §103.20(b) (1999). As sales agent for Triad Realty, Crank was an employee of Triad, not of Meyer, and Triad was *"the directing or controlling person."* Thus, even if applicable, this regulation leads only to the conclusion that

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[7] 24 C.F.R. §103.20 (1999): "Persons against whom complaints may be filed. (a). . . (b) A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale, rental, advertising or financing of dwellings or the provision of brokerage services relating to the sale or rental of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice."

Triad Realty, not Meyer, bears liability for the actions of Crank.

Moreover, examination of the history of 24 C.F.R. § 103.20 clearly demonstrates that it was not intended to be applied with the broad brush wielded by the Ninth Circuit. That history is accurately and articulately set forth in the dissenting opinion in *Walker v. Crigler*:

> *The history of the promulgation of the present §103.20 confirms that HUD in no way intended to impose strict vicarious liability upon innocent property owners. . . .*
>
> *. . . HUD's comments accompanying the publication of the final version of the rule in question, which remains the version in force today, both make clear that no strict liability was intended:*
>
> *'[I]t is not HUD's intent to impose absolute liability on any principal; the intent, in proposing paragraph (b), was to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to the liability of a principal for acts of an agent. . . . 53 Fed. Reg. 24185 (1988)'*

976 F.2d 900, 906-07 (4th Cir. 1992) (Widener, dissenting) (footnotes omitted).

The dissent in *Walker* concludes that "the most straightforward reading of the text of the present §103.20, . . . (provides) that familiar principles of agency law, and not strict liability, control a principal's liability for the acts of an agent." *Id.*

Thus, this regulation was not intended to impose absolute liability even on real estate brokers to whom sales agents are directly responsible, let alone the owners and officers of the real estate firm who employ these brokers and agents. Instead, HUD's intent was merely to codify case law regarding the liability of a principal for acts of an agent, including the requirement that the principal (the broker) is liable only if the agent was acting within the scope of his or her authority.

Given that, it is incorrect to apply this regulation to hold that innocent owners and officers of corporate real estate firms, who are not, as noted above, principals of the agents of the firm, absolutely liable for the conduct of agents.

In short, neither the text of the Act, its legislative history, nor the regulations adopted by HUD for enforcement of the Act, including the specific regulation relied on below, support the Ninth Circuit's conclusion that "owners and officers of corporations may be held vicariously liable for an employee's violations of the Fair Housing Act . . . ." *Holley*, 258 F.3d at 1129.

II. The Non-Delegation Doctrine Does Not Require an Innocent Owner or Officer of a Real Estate Brokerage Corporation To Be Held Strictly Liable for the Fair Housing Act Violations of the Corporation's Agents.

The Ninth Circuit also concluded that Meyer was liable as sole owner and officer of Triad "because the duty not to discriminate is a non-delegable one. . . ." *Holley*, 258 F.3d at 1134. Contrary to the Ninth Circuit's holding, the non-delegation principle does not require or support the conclusion that owners and officers of real estate brokerage corporations are strictly liable for the acts of agents of the corporation.

A. The Non-Delegation Doctrine Creates an Exception to the Rule of Respondeat Superior Such That a *Principal* May Be Held Liable for the Conduct of a Corporate Agent Regardless of Whether the Conduct Was Within the Scope of the Agent's Employment.

The concept and the consequences of non-delegable duties are set forth in the Restatement (Second) of Agency § 214 (1958), which subjects a principal "to liability to others for harm caused to them by the failure of (an) agent to perform (a non-delegable) duty." Comment (a) to this section explains

that a principal "is normally not responsible for the conduct of others, except that of his agent or servant acting within the scope of their employment . . .," and then explains that when a principal has "a duty to see that due care is used in the protection of another, . . . the duty of care is non-delegable." In such event, the Restatement continues, a principal may be responsible for harm caused by conduct of his agents or servants not within the scope of employment. *Id.*

Relying on this section of the Restatement, this Court addressed the doctrines of non-delegable duties and respondeat superior, albeit not in a Fair Housing Act context, in *General Bldg. Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375 (1982). In that decision, this Court noted that "the (non-delegation) doctrine creates an exception to the common-law rule that a principal normally will not be liable for the tortious conduct of an independent contractor." *Id.* at 396.[8] This Court went on to comment that "[i]n a sense, to characterize such a duty as 'nondelegable' is merely to restate the duty. . . . The question is what duty does (the statute) impose." *Id.*[9]

Under respondeat superior, therefore, principals are liable only for acts of their agents within the scope of their employment. Where the principal has a duty deemed to be non-delegable, however, liability may be imposed on the principal even if the agent acts outside the scope of employment. In either case, the threshold question is whether the defendant is a principal of the person who committed the actions on

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[8] *See also Maguire v. Montana*, where the Montana Supreme Court also described § 214 as providing a "nondelegable duty exception to the (common law) respondeat superior doctrine." 835 P.2d 755, 759 (Mont. 1992).

[9] As explained in Section I of this *amicus* brief, the Act imposes *no* duties on owners and officers of real estate brokerage corporations in such capacities alone.

which the plaintiff's claims are based. As a matter of law, owners and officers of real estate corporations are not, as a consequence of those capacities alone, principals of the agents of the corporation. *Berry v. Stevinson Chevrolet*, 804 F.Supp. 121, 134 (D.Colo. 1992).

B. Courts Have Inconsistently Applied the Non-Delegation Doctrine in Their Analyses of Prior Fair Housing Act Cases.

The non-delegation concept in Fair Housing Act cases appears to have been first suggested in *U.S. v. Real Estate Dev. Corp.*, 347 F.Supp. 776 (N.D. Miss. 1972). In *Real Estate Dev. Corp.*, a case involving alleged racial discrimination in making rental housing available, the court attributed the actions of the resident apartment managers to the defendants who had employed them—that is, to their principals. *Id.* at 785.[10] The court noted that the managers/agents' "acts and statements, made within the scope of their agency, were attributable to the defendants, whose duty to comply with the law is 'non-delegable.' " *Id.* at 785. Thus, the court improperly addressed the "scope of agency" question in its non-delegability analysis.

Real Estate Dev. Corp. was subsequently quoted and relied on in *U.S. v. Youritan Constr. Co.*, where the court concluded that the owner and property manager of an apartment complex was liable for the discrimination of its apartment manager rental agent "both under the doctrine of respondeat superior and because the duty to obey the law is non-delegable." 370 F.Supp. 643, 649 (N.D. Cal. 1973), *aff'd in part,*

[10] The principals were both the corporation that had owned the property and the individual owner, who had become the property owner upon dissolution of the corporation, which had taken place prior to the court's decision. 347 F. Supp. at 779.

remanded in part by 509 F.2d 623 (9th Cir. 1975). The court did not explain its understanding of the distinction between those two doctrines, but merely noted that "where, as here, management's lack of supervision and failure to establish objective and reviewable procedural standards have resulted in apartments being made unavailable to blacks by agents and employees, management's failure to act is in itself violative of § 3604(a)." *Id.*

Shortly thereafter, in *Marr v. Rife*, the Sixth Circuit reversed the District Court's conclusion that the owner of a real estate firm could not be held liable for the discrimination of the firm's agents, citing the non-delegability principle articulated in *Youritan* and *Real Estate Dev. Corp. Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974). The District Court had held that defendant Doug Rife, proprietor of the Doug Rife Realtor Agency, could not be charged with liability because there was no evidence that he had personally joined in any of his agent's discriminatory conduct, or that the agent "acted with the approval or at the direction of Rife." *Id.* at 740-42.

The Sixth Circuit reversed, asserting that "as owner of the agency, Rife had at least the power to control the acts of his salesmen." *Id.* at 742. Thus, in *Marr*, the court concluded that the duty of an owner to comply with the Fair Housing Act is non-delegable, and held the owner—the principal of the agents who engaged in the discriminatory conduct—liable, notwithstanding his lack of knowledge or involvement in the discriminatory acts. *Id.*[11]

[11] It is important to note that *Marr* is distinguishable from the facts in this case because the firm is described only as "a real estate agency," and thus not necessarily a corporation. Indeed, the opinion refers to defendant Doug Rife as "proprietor of the agency," at least suggesting that the firm was a sole proprietorship, rather than a corporation. In either event, the court in *Marr* correctly applied the

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Subsequent Fair Housing Act cases have likewise held that compliance with the Act is non-delegable, but that conclusion is inapt to the question of liability of corporate owners and officers of real estate corporations for the acts of corporate agents. These cases are not consistent in imposing liability on a principal without consideration of whether the agent acted within his scope of employment, or whether the principal engaged in his own culpable conduct. But they are *completely* consistent in applying the non-delegability doctrine to the question of whether a principal is liable for the acts of an agent, which is, of course, the fundamental purpose of the doctrine of respondeat superior and the non-delegability exception to that common law rule.

For example, in *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, the Seventh Circuit applied non-delegability to hold the defendant corporation liable for the acts of its sales agents, citing *General Bldg. Contractors* as to the application of respondeat superior and agency law: "[A] principal cannot free itself of liability by delegating to an agent the duty not to discriminate." (Citations omitted.) 982 F.2d 1086, 1096 (7th Cir. 1992), *cert. denied by Ernst v. Leadership Council for Metro. Open Communities*, 508 U.S. 972 (1993). By contrast, the court did not reference non-delegability to conclude that Erwin Ernst, the owner of the defendant corporation, was personally liable for the Fair Housing Act violations of certain sales agents of the firm. *Id.* at 1098. Instead, the court cited Ernst's conduct and functional responsibilities as sole owner, chief executive officer and "[s]ignificantly, (supervisor of) the day-to-day operations of Matchmaker and its agents." *Id.* Based on Ernst's *personal* involvement in real estate activities, with the corresponding duty of Fair Housing Act compliance because of that personal involvement, and not simply and solely based on non-delegability or his status as owner and CEO of Matchmaker Real Estate Sales Center, Inc., the court held Ernst personally liable. *Id.*

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non-delegability doctrine in that it imposed liability on the principal without regard to whether the agent was acting within or outside the scope of his agency.

Walker v. Crigler is also consistent with this formulation. 976 F.2d 900 (4th Cir. 1992). In *Walker*, the owner of rental property was held liable for discriminatory conduct by the property manager, whose duties included renting the property and who had been hired by the owner. *Id.* at 904-05. The *Walker* court applied non-delegation to hold the rental property *owner* liable for the acts of its agents, but that conclusion is inapplicable to the quite different question of whether a violation of the Fair Housing Act by agents *of the corporation* can be imputed to the corporation's owners and officers.

In *Coates v. Bechtel*, the Seventh Circuit acknowledged that under the Fair Housing Act "the courts have imputed the wrongful acts of a real estate sales or rental agent to the property *owner* he is representing regardless of whether the owner specifically authorized the agent to engage in the racial discrimination" and that "the duty of property *owner* 'to obey the laws relating to racial discrimination' is nondelegable." 811 F.2d 1045, 1051 (7th Cir. 1987) (emphasis added). Similarly, in *Alexander v. Riga*, the court "adopt(ed) the general rule applied by other federal courts that the duty of a *landlord* not to discriminate in the leasing of property may not be delegated to the *landlord's* employee." 208 F.3d 419, 433 (3rd Cir. 2000), *cert. denied by* 531 U.S. 1069 (2001) (citing *Walker*, *Marr*, *Phiffer*, and *Coates*) (emphasis added).[12] Numerous courts in other Fair Housing Act cases have cited "non-

[12] *See also Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980) (although non-delegation was cited, the court also noted a fault-based reason for holding the individual defendant personally liable for the desk clerk's discrimination where the desk clerk's actions were dictated by the hotel management's policies).

delegation" as a basis on which to do nothing more than apply vicarious liability to hold a principal liable for the acts of an agent.[13]

C. The Non-Delegation Doctrine Does Not Apply to Owners and Officers of Real Estate Brokerage Corporations Because Such Owners and Officers Are Not the Principals of the Corporate Agents Who Committed the Unlawful Acts.

When the doctrinal underpinnings of non-delegation are properly understood, it is clear that the conclusion that compliance with the Fair Housing Act is "non-delegable" has no significance to the issue presented here: whether owners and officers of an incorporated real estate brokerage firm are liable for Fair Housing Act violations by agents of the firm. Non-delegability applies only to impose liability on a principal for the conduct of his agent, and therefore can result in liability only for the principals of those agents—that is, the real estate brokerage corporations that employ the agents.

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[13] *U.S. v. Garden Homes Mgmt. Corp.*, 156 F.Supp. 2d 413 (D.N.J. 2001); *Fair Housing Congress v. Weber*, 993 F.Supp. 1286 (C.D. Cal. 1997); *Williams v. Poretsky Mgmt., Inc.* 955 F.Supp. 490 (D.Md. 1996); *Portee v. Hastava*, 853 F.Supp. 1335 (E.D.N.Y. 1994); *Zuch v. Hussey*, 394 F.Supp. 1028 (E.D. Mich. 1975); *U.S. v. Youritan Constr. Co.*, 370 F.Supp. 643 (N.D. Cal. 1973). A few federal district courts have held that corporate officers may be held personally liable for violations by corporate employees. These cases, however, are essentially uniform in failing to provide any analysis, or usually much discussion, as to why they disregard the corporation, and must be dismissed as simply misguided. *See U.S. v. Tropic Seas, Inc.*, 887 F.Supp. 1347 (D.Haw. 1995); *Saunders v. General Servs Corp.*, 659 F.Supp. 1042 (E.D. Va. 1987); *Leadership Council for Metropolitan Open Communities v. Chicago Southwest Holiday Inn Operators Oak Lawn Lodge, Inc.*, 1985 WL 3601 (N.D. Ill. 1985); *Harrison v. Otto G. Heinzeroth Mortgage Co.*, 430 F.Supp. 893 (N.D. Ohio 1977); *U.S. v. L & H Land Corp., Inc.*, 407 F.Supp. 576 (S.D.Fla 1976).

The correct approach is illustrated by the thoughtful analysis of the Northern District of Illinois in *Reed v. Michael Realty & Associates, Inc.*, where the court found that the president and secretary of a real estate brokerage corporation, George S. Michael, was not personally liable for the discriminatory acts of the corporation's apparent agent by virtue of being a corporate officer and nothing more. 1994 WL 559225, 10 (N.D. Ill. 1994). The court noted "Courts of Appeal, including our own, . . . have observed that the duty of a property owner not to discriminate is non-delegable." The court went on to recognize the wrongdoer as an agent of the corporate real estate firm employed by the property owner, rather than an agent of Michael personally. *Id.* at 6-7. The court thus refused to hold Michael liable, by virtue of his status as secretary and president alone, for the acts of the corporation's agent. *Id.* at 10. Though the court noted that the duty of Fair Housing Act compliance is non-delegable, because the alleged wrongdoer was not an agent of defendant Michael, Michael could not be personally liable, based solely on the fact that he was an officer of the corporation of which the wrongdoer was an agent.

In short, the Ninth Circuit erred in concluding that because Fair Housing Act compliance is non-delegable, personal liability may be extended to owners and officers of corporate firms when corporate agents violate the Act. Non-delegability and ordinary principles of respondeat superior address whether principals may be held liable for the misconduct of agents, and both hold that a principal may be liable for violations of the Act by an agent. But neither applies or is instructive with regard to the question before this Court, which is whether owners and officers of an incorporated real estate brokerage firm are liable for Fair Housing Act violations by the firm's agents.

III. Common Law Provides No Basis for Abandoning Traditional Principles of Corporate Law to Hold an Innocent Corporate Owner or Officer Strictly Liable for Fair Housing Act Violations of the Corporation's Agents.

The Ninth Circuit correctly recognized that "under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action . . ." *Holley*, 258 F.3d at 1129. Turning to the question of whether courts should apply different criteria when the employee's conduct violates the Fair Housing Act—that is, "whether owners and officers of corporations may be held vicariously liable for an employee's violations of the Fair Housing Act (FHA)," the Ninth Circuit answered, "We conclude that they can." *Id.*

This conclusion is wrong. As explained below, there is no merit to the claim that departure from traditional principles of corporate law is warranted by the highly important interests safeguarded by the Fair Housing Act. In cases involving other significant interests, such as equal employment opportunity, environmental protection, product liability, RICO and consumer health, which are also of critical importance, courts have not abandoned long-standing corporate principles when examining the potential liability of corporate owners and officers. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (RICO); *U.S. v. Park*, 421 U.S. 658 (1975) (Federal Food, Drug and Cosmetic Act); *Browning-Ferris Industries of Illinois v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999), *cert. denied by Ter Maat v. Browning-Ferris Indus. of Ill., Inc.*, 529 U.S. 1098 (2000) (environmental); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168 (5th Cir. 1985) (products liability); *Berry v. Stevinson Chevrolet*, 804 F.Supp. 121 (S.D.N.Y. 1993) (employment/race discrimination).

Neither is the Ninth Circuit's determination to ignore these time-honored principles of corporate law required in order to adequately protect the victims of Fair Housing Act violations.

Such victims have other remedies and opportunities to recover against truly culpable parties. First, courts can hold the corporation itself liable. *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982). *See also Fletcher Cyclopedia of the Law of Private Corporations*, § 33 (Perm. ed).

Second, courts, including this Court, have used at least two other existing theories of law to hold corporate officers and owners personally liable, under appropriate circumstances, for the unlawful conduct of corporate agents: (1) the participation theory, *Saltiel v. GSI Consultants, Inc.*, 788 A.2d 268 (N.J. 2002); *Shipley v. Perlberg*, 780 A.2d 396 (Md. 2001); *Skelton v. Chem. Leaman Tank Lines, Inc.*, 1996 WL 278343 (Conn. Super. 1996), and (2) the responsible corporate officer doctrine. *Park*, 421 U.S. at 673-74; *Commissioner, Indiana Dep't of Envtl Mgmt. v. RLG, Inc.*, 755 N.E.2d 556 (Ind. 2001).

Finally, when there is evidence that the corporation is a sham and does not have the financial resources necessary to provide recourse, courts can pierce the corporate veil so that the plaintiff may recover from an owner who was at fault. *U.S. v. Bestfoods*, 524 U.S. 51, 62 (1998); *Anderson v. Abbott*, 321 U.S. 349, 356 (1944). For these reasons, this Court should reject the Ninth Circuit's suggestion that courts should abandon established corporate law principles in the context of fair housing.

A. Accepted Principles of Corporate Law Clearly Provide that Corporate Owners and Officers Are Not Personally Liable, Solely on the Basis of their Positions, for the Unlawful Acts of the Corporation's Agents.

A fundamental tenet of corporate law, recognized consistently by this Court, is that the corporate entity is separate from its owners and officers. *Kushner*, 533 U.S. at 163; *Bestfoods*, 524 U.S. at 61; *Burnet v. Clark*, 287 U.S. 410, 415 (1932).

What underlies this recognition is that

> *the principle of limited liability . . . serves the important social purpose of encouraging investment by individuals who are risk averse and therefore will not invest (or will insist on a much higher return) in an enterprise if by doing so they expose their entire wealth to the hazards of litigation.*

Browning-Ferris, 195 F.3d at 959.

In addition, judicial recognition of the corporate structure, including its limitations on individual liability, is not inconsistent with justice for the victims of corporate employee/agent misconduct because wronged plaintiffs retain a legitimate and usually adequate source for remedy—the corporation itself. *Hydrolevel*, 456 U.S. at 556; *Dillon v. AFBIC Dev. Corp.*, 597 F.2d 556, 563 (5th Cir. 1979); *U.S. v. Northside Realty Associates, Inc.*, 605 F.2d 1348, 1353-54 (5th Cir. 1979); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232 (N.D. Ohio 1983), *aff'd in part, rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985), *cert. denied by Hilltop Realty, Inc. v. City of Cleveland Heights*, 475 U.S. 1019 (1986).

Federal and state courts across the country uniformly and consistently apply the axiom that even the Ninth Circuit in *Holley* has acknowledged: corporate owners and officers are generally not personally liable for the torts committed by agents of their corporations. 258 F.3d at 1129.[14] This is true

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[14] *See also Bestfoods*, 524 U.S. 51 at 61-62; *Burnet*, 387 U.S. at 415; *Micro Chem., Inc. v. Great Plains Chem. Co., Inc.*, 194 F.3d 1250 (Fed. Cir. 1999); *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 1999); *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725 (9th Cir. 1999); *Northside*, 605 F.2d at 1353-54; *In the Matter of Jesse Jenkins*, 788 A.2d 268 (N.J. 2002); *PMC, Inc. v. Kadisha*, 78 Cal.App.4th 1368, 93 Cal. Rptr.2d 663 (2000); *City of Evanston v. Baird & Warner, Inc.*, 1989 WL 134310, 3 (N.D. Ill. 1989); *Bischofshausen, Vasbinder, & Luckie v. D.W.*

(continued...)

even when the defendant is the sole shareholder of a corporation. *Cancun Adventure Tours v. Underwater Designer Co.*, 862 F.2d 1044, 1047 (4th Cir. 1988); *Dillon*, 597 F.2d at 563; *One Pacific Towers Homeowners' Association v. Hal Real Estate Investments, Inc.*, 30 P.3d 504 (Wash. App. 2001). As this Court has said, "[l]imited liability is the rule, not the exception." *Anderson*, 321 U.S. at 361-62.

Thus, courts do not automatically impose strict liability on corporate officers and owners. *E.g., Browning-Ferris*, 195 F.3d at 956 ("the officer is (not) automatically liable for the acts of the corporation; . . . there is no doctrine of 'superiors' liability,' comparable to the doctrine of respondeat superior, ..."). Rather, courts look for actual participation or involvement in the wrongful act. *Mozingo*, 752 F.2d at 173-74; *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991); *Hilltop*, 629 F.Supp. at 1303-04; *RLG*, 755 N.E.2d at 561; *Bischofshausen, Vasbinder, & Luckie v. D.W. Jaquays Mining & Equip. Contractors Co.*, 700 P.2d 902, 908-09.

B. Courts Do Not Disregard Established Principles of Corporate Law in Other Contexts of Significance, and Have No Need to Do So to Protect the Important Interests of the Fair Housing Act.

This bedrock principle of corporate law is adhered to by courts in many contexts, which, like fair housing, have critical societal importance. For instance, courts have upheld this

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(...continued)

Jaquays Mining & Equip. Contractors Co., 700 P.2d 902, 908-09 (Ariz. Ct. App. 1985); *Crigler v. Salac*, 438 So.2d 1375, 1380 (Ala. 1983); *Hilltop*, 629 F.Supp. at 1304; *Wicks v. Milzoco Builders, Inc.*, 470 A.2d 86, 90 (Pa. 1983); *Scribner v. O'Brien, Inc.*, 363 A.2d 160, 168 (Conn. 1975); *Fletcher Cyc. Corp.*, §§ 7, 14 (Perm. ed.) ("The shareholders of a corporation, unless they personally participate, are not liable individually for torts committed by the corporation.").

principle when determining whether officers or owners of corporations responsible for environmental hazards are liable individually. *E.g., Browning-Ferris*, 195 F.3d at 956 (remanded to determine whether the defendant had actually "operated the landfill personally, rather than merely directing the business of the corporations of which he was the president"); *Riverside Mkt. Dev. Corp. v. Int'l Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.), *cert. denied by Riverside Market Ltd. Partnership v. Prescott*, 502 U.S. 1004 (1991) (CERCLA imposes liability only on persons who actually participate in the operation of the facility; thus, inactive shareholder and officer not personally liable for environmental clean-up costs); *U.S. v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 744 (8th Cir.), *cert. denied by* 484 U.S. 848 (1987) (corporate officer individually liable under CERCLA, but only because he had personally arranged for the transportation and disposal of hazardous substances for the corporation); *Shipley v. Perlberg*, 780 A.2d 396 (Md. 2001) (corporate officer not personally liable for negligent lead based paint poisoning of resident of property that was owned by corporation because officer had no involvement in decision making, maintenance, or rental aspects.) Thus, while charged with the responsibility to ensure that important environmental goals are met, courts nonetheless refuse to hold corporate officers and owners personally liable for violations of environmental laws committed by their corporations or their corporations' agents solely on the basis of their corporate positions.

Neither do courts hold corporate owners and officers strictly liable in the employment arena. *E.g., Sasso v. Cervoni*, 985 F.2d 49, 51 (2d Cir.), *cert. denied by Bourgal v. Cervoni*, 508 U.S. 973 (1993) (sole officer, director and shareholder not personally liable for the ERISA obligations of his corporation where he had not participated in wrongdoing and where corporation was not a sham); *Whidbee v. McDonald's Corp.*, 75 F.Supp.2d 183, 193 (S.D.N.Y. 1999), *aff'd in relevant part by Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62 (2d Cir.

2000) (restaurant owners not personally liable under §1981 because there was no evidence of a "causal relationship" between the owners and the alleged racial harassment of employees); *Bramesco v. Drug Computer Consultants*, 834 F.Supp. 120, 123 (S.D.N.Y. 1993) (Potential liability of the corporation under Title VII or the ADEA does not "necessarily impute vulnerability to suit on the part of its officers, directors or owners . . . at least absent separate intentional misconduct."); *Berry v. Stevinson Chevrolet*, 804 F.Supp. 121, 133-34 (D. Colo. 1992) (corporation's owner and manager not personally liable for race discrimination because he had not participated in discrimination; employees who had engaged in unlawful discrimination were agents of the corporation rather than agents of the owner/manager); *Lawlor v. District of Columbia*, 758 A.2d 964, 975-78 (Ct.App. DC 2000) (Father and daughter shareholders/officers personally liable under the Wage Payment Law because of the level of their involvement in wrongful act, while wife/mother, who was corporate secretary, not personally liable because she had not meaningfully participated in the unlawful conduct).

Although these decisions are based on employment law statutes that differ from one another as to their definitions of an "employer", whether an individual is within the definition under a specific statute and may thus be held liable depends on the individual's specific conduct and fault. This includes considerations such as whether the corporate owner and/or officer participated in or directed the wrongdoing, or whether he/she knowingly acquiesced in the unlawful conduct. In short, in the employment context, including the employment discrimination context, where the law, like fair housing law, seeks to guarantee equal treatment to groups of individuals that have historically been discriminated against, liability is fault-based, and not strictly imposed on individuals merely because of their positions.

Courts in a wide range of other contexts, too, consistently require evidence of individual fault before they hold a corporate owner or officer personally liable for the wrongful

acts of the corporation's agent.[15] Of particular note is that courts adhere to this established principle in product liability cases, where public health and safety concerns are often preeminent. For instance, the Fifth Circuit refused to hold the corporation's president personally liable for defects in a cherry picker because the president's involvement in the manufacture of the cherry picker was inadequate to warrant such liability. *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 173-74 (5th Cir. 1985). The court noted that to be held personally liable, an officer "must have some direct, personal participation in the tort, as where the defendant was the 'guiding spirit' behind the wrongful conduct . . . or the 'central figure' in the challenged corporate activity." *Id.*, quoting *Escrude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980).

C. There Is No Need to Abandon Traditional Principles of Corporate Law to Prevent Injustice Because Existing Principles Already Provide Victims With Just Remedies.

Some courts conclude that it is occasionally necessary to adhere to traditional corporate law principles less rigidly in order to prevent injustice. *Mark v. Universal Builders*, 501 F.2d 324, 337 (7th Cir.) *cert. denied by* 419 U.S. 1070 (1974); *Anderson*, 321 U.S. at 356; *Browning-Ferris*, 195 F.3d at 959; *Matchmaker*, 982 F.2d at 1089-94. In such instances, courts have articulated special doctrines or theories to "do right" by the innocent tort victim by seeking a reasoned basis to impose what really is fault-based liability on a corporate officer and owner.

A number of courts have applied the "participation theory," under which a corporate officer may be liable for the corporation's breach of its duty to an injured third party, where the corporation delegated this duty to the corporate officer and where the corporate officer breached this duty *through personal fault*. *Saltiel*, 788 A.2d at 271; *Shipley*, 780 A.2d at 396; *Skelton*, 1996 WL 278343 at 7-8; *Wicks*, 470 A.2d at 90.[16] The court in *Wicks* thus noted that "[l]iability under this theory attaches only where the corporate officer is an actor who participates in the wrongful acts. Therefore, corporate officers may be held liable for misfeasance." 470 A.2d at 90.

Courts have also relied on the "responsible corporate officer doctrine." *E.g., Commissioner, Indiana Dep't. of Envtl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556 (Ind. 2001).[17] The Supreme Court of Indiana recently applied this doctrine to hold a sole shareholder and corporate officer liable for the violation of a state environmental law because of his direct involvement in the violation, and not because of his corporate positions alone. *Id.* at 561. In doing so, the court, relied on two decisions of this Court, *U.S. v. Dotterweich*, 320 U.S. 277 (1943), and *U.S. v. Park*, 421 U.S. 658 (1975), and articulated the doctrine to require that:

> (1) the individual must be in a position of responsibility which allows him to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; *and* (3) *the individual's actions or inactions facilitated the violations.*

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[15] *E.g., Micro Chem., Inc.*, 194 F.3d at 1261 (patent infringement); *Coastal Abstract Serv.*, 173 F.3d 725 (9th Cir. 1999) (false advertising); *PMC*, 78 Cal.App.4th 1368, 93 Cal.Rptr.2d 663 (intellectual property); *Rooney, III v. Commonwealth of Virginia*, 500 S.E.2d 830 (Va. 1998) (criminal embezzlement); *Salac*, 438 So.2d at 1380 (fraud); *Scribner*, 363 A.2d at 168 (construction defects).

[16] *See Johnson v. Harrigan-Peach Land Dev. Co., Inc.*, 489 P.2d 923, 928 (Wash. 1971); *Fletcher Cyc. Corp.*, §1137 (Perm. ed.).

[17] *See U.S. v. Hodges X-Ray, Inc.*, 759 F.2d 557, 560-61 (6th Cir. 1985); *Saltiel*, 788 A.2d at 268; *Rooney*, 500 S.E.2d at 830; *Matter of Dougherty*, 482 N.W.2d at 488-90 (Minn. Ct. App. 1992).

RLG, 755 N.E.2d at 561 (emphasis added), *quoting Matter of Dougherty*, 482 N.W.2d 485, 488-90 (Minn. Ct. App. 1992).

In both *Dotterweich* and *Park*, this Court was willing to hold defendants liable for violations of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-92 (1938) only where it could be shown that they "had a responsible relation to the violation of the statute" and not merely because of their corporate positions. *Park*, 421 U.S. at 673-74; *Dotterweich*, 320 U.S. at 284.

The Indiana court summarized its analysis under the doctrine by indicating that it was not the defendant's

> *status as officer, director, or sole shareholder of RLG that is determinative under this theory. Each of these in itself may be sufficiently removed from the relevant corporate activities that the individual is not a 'responsible corporate officer' despite high corporate office. Rather it is Roseman's (the defendant) direction of and involvement in operating the landfill, his representation to IDEM that he was the responsible party, and his actual role in the corporation's activities that are critical.*

RLG, 755 N.E.2d at 561.

Thus, both the participation theory and the responsible corporate officer doctrine are available to provide substantial protection for the public and to prevent injustice to victims. Under neither doctrine, however, is a corporate officer or owner liable simply because of his position. There must be a degree of wrongful conduct by the corporate owner or officer.

Finally, it is unnecessary to ignore established corporate law principles to protect victims of misconduct by corporate agents in any context, including fair housing. First, the victims may seek remedies from the corporations themselves. *Dillon*, 597 F.2d at 563; *Northside*, 605 F.2d at 1353-54. Under agency principles, a corporation can be sued and held liable for the torts committed by its agents. *Hydrolevel*, 456 U.S. at 556; *Moline v. IRS*, 319 U.S. 436, 440 (1943) (corporate em-

ployee is the agent of the corporation, not the agent of the officers or owners personally). Second, when the corporation has insufficient assets, traditional legal principles provide a remedy against corporate owners and officers by allowing, under appropriate facts, piercing of the corporate veil. *Bestfoods*, 524 U.S. at 62-63; *Anderson*, 321 U.S. at 362; *Browning-Ferris*, 195 F.3d at 959.

In sum, the principle that corporate owners and officers are not personally liable for the unlawful conduct of the corporation's agents solely on the basis of their corporate positions is well-established and consistently upheld by courts—even with regard to other issues of high societal concern. It is unnecessary to disregard this principle to provide a remedy for victims of wrongful conduct, whether such conduct be discriminatory actions or other types of misfeasance, and this Court should declare that the Ninth Circuit erred when it did so.

IV. An Owner or Officer of a Real Estate Brokerage Corporation May Be Personally Liable for the Fair Housing Violations of a Corporate Agent Only If the Owner or Officer Participated in, or Was Otherwise Specifically Responsible for, the Agent's Conduct.

The correct answer to the question before this Court—whether owners and officers are strictly and personally liable for the Fair Housing Act violations by agents of the firm—is aptly illustrated by prior decisions of courts that have started with the basic tenet of corporate law that "no individual may be held vicariously liable for a company pattern or practice simply because she is an officer or manager of the company." *U.S. v. Lorantffy Care Cntr.*, 999 F.Supp. 1045 (N.D. Ohio 1998). A number of courts have refused to hold corporate owners and officers liable under the Fair Housing Act by virtue of their status alone. *Reed v. Michael Realty & Associates, Inc.*, 1994 WL 559225 9, 10 (N.D. Ill. October 7, 1994); *Heights Community*

Congress v. Hilltop Realty, Inc., 629 F. Supp. 1232 (N.D. Ohio 1983), *aff'd in part, rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985), *cert. denied by Hilltop Realty, Inc. v. City of Cleveland Heights*, 475 U.S. 1019 (1986). *Accord, Lorantffy*, 999 F.Supp. at 1045; *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141 (4th Cir. 1975). These courts have opted instead for a thorough analysis of the facts regarding the relationship between the corporate owners or officers and the discriminatory conduct. This is the proper result and that which this Court should adopt.

For example, in *Hilltop*, the U.S. District Court, District of Northern Ohio, declined to hold Vincent Aveni, the president, chief operating officer and co-owner of Hilltop Realty, Inc., vicariously liable for the fair housing violations of Hilltop agents, absent a showing "that he participated in their acts or knew of and ratified their acts and statements." 629 F. Supp. at 1304. The court recognized that the agents had a contractual relationship with the corporation, not with Aveni, so only the corporation was liable for the imputed actions of the agents, noting specifically that Aveni's "status as president and chief operating officer in and of itself does not render him personally liable for acts of the corporation or its agents or employees." *Id.* at 1303-04.[18]

In *Lorantffy*, the court found that four individual defendants "associated with" a nursing home owned by a not-for-profit corporation (relationship not specified) were entitled to judgment as a matter of law. 999 F.Supp. at 1040-41. The law, the court said, provides that "no individual may be held vicariously liable for a company pattern or practice simply because she is an officer or manager of the company." *Id.* at 1044. The

[18] The court also conducted a thorough review of the facts and concluded that Aveni had not participated in, knew of or ratified the discriminatory conduct, and refused to hold him liable on that basis as well. *Hilltop*, 629 F.Supp. at 1305.

court held that the individual defendants could not be held liable for the discriminatory conduct, and that only the "company is liable for the acts and statements of its employees." *Id.* at 1045. The court also noted that the other courts in its circuit that had addressed similar violations of the Fair Housing Act had applied the "doctrine of vicarious liability to the company, not the company's individual officers." *Id.*, citing *Hilltop*, 629 F.Supp. at 1303; *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974). *See also Reed v. Michael Realty & Associates, Inc.*, 1994 WL 559225, discussed *infra*, and *Tillman*, 517 F.2d at 1144.

In *Tillman*, the Fourth Circuit held that §§1981 and 1982 of the Civil Rights Acts of 1866 and 1964 "should be interpreted as neither enlarging nor diminishing the liability of directors under general corporation law for tortious acts performed nominally by the corporation." *Id.* The court was thus unwilling to hold the directors of Wheaton-Haven Recreation Association personally liable for discrimination by the Association by virtue of their positions as directors alone. *Id.* Instead, the court engaged in a comprehensive examination of the directors' actions and intentions and reasoned that "directors become personally liable when they intentionally cause a corporation to infringe the rights secured by §§ 1981 and 1982." *Id.* at 1146.

In sum, since owners and officers of real estate brokerage corporations may not be held liable for the Fair Housing Act violations of corporate agents merely by virtue of their positions, such individuals may be held liable only on the basis of personal fault or culpability for the discriminatory conduct. Such a fault-based standard requires a showing that the owner or officer personally participated in the discriminatory acts, or that, in addition to serving as owner or officer, the individual was actually engaged in conduct that led to the Fair Housing Act violations. In those instances, liability may be imposed in accordance with traditional corporate law principles.

CONCLUSION

For the foregoing reasons, NAR respectfully urges this Court to hold that owners and officers of real estate brokerage corporations are not personally and absolutely liable for an employee's or agent's violation of the Fair Housing Act. This Court should reverse the Ninth Circuit and affirm the District Court's ruling that owners and officers of real estate corporations are not, as a matter of law, liable for the Fair Housing Act violations of the firm's agents. Personal liability of owners and officers must be grounded in their personal participation in the allegedly unlawful conduct, or their personal involvement in, or responsibility for, the real estate activities out of which the alleged violation arose.

DATED: August 2, 2002

Respectfully submitted,

LAURENE K. JANIK
Counsel of Record
General Counsel
RALPH W. HOLMEN
Associate General Counsel
NAN ROYTBERG
Associate Counsel
National Association of REALTORS®
430 North Michigan Avenue
Chicago, Illinois 60611-4087
(312) 329-8375

Attorneys for Amicus Curiae
National Association of REALTORS®

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Supreme Court of the United States

DAVID MEYER, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT AND DESIGNATED OFFICER/BROKER OF TRIAD, INC., dba TRIAD REALTORS,

Petitioner,

v.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, A MINOR; BROOKS BAUER, INDIVIDUALLY AND ON BEHALF OF THE GENERAL PUBLIC,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE AND AARP IN SUPPORT OF RESPONDENTS

VIRGINIA A. SEITZ
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736-8015

JOHN P. RELMAN*
MEERA TREHAN
RELMAN & ASSOCIATES
1350 CONNECTICUT AVE., N.W.
WASHINGTON, D.C. 20036
(202) 728-1888

Counsel for Amici Curiae

* Counsel of Record

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Williamson v. *Hampton Mgmt. Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972) 11, 26
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42 U.S.C. § 3601 *et seq.* .....*passim*
49 Fed. Reg. 40,528, 40,533 (Oct. 16, 1984) 16
53 Fed. Reg. 24,184-85 (June 27, 1988) 16
64 Fed. Reg. 18,538-39 (Apr. 14, 1999) 17
Cal. Bus. & Prof. Code §§ 10130, 10131, 10159.2, 10211, 10175-85 .....6, 21, 22

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Sen. Comm. on Bus. & Professions, *Staff Analysis of AB 985* (Cal. 1979) 22

MISCELLANEOUS

1 W. Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* (1990) 28

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1 William Blackstone, *Commentaries on the Law of England* (Clarendon Press 1765)..... 18
Black, B., *Application of Respondeat Superior Principles to Securities Fraud Claims Under RICO*, 24 Santa Clara L. Rev. 825 (1984)..... 21
Conrad, A., *Enterprise Liability and Insider Trading*, 49 Wash. & Lee L. Rev. 913 (1992)..... 21
Dubofsky, Jean E., *Fair Housing: A Legislative History And A Perspective*, 8 Washburn L.J. 149 (1969)..... 14
Helper, Rose, *Racial Policies and Practices of Real Estate Brokers* (U. Minn. Press 1969)..... 14
Prentice, R., *Conceiving The Inconceivable and Implementing the Preposterous: The Premature Demise of Respondeat Superior Liability Under Section 10(b)*, 58 Ohio St. L.J. 1325 (1997)..... 18, 21, 27
Schwemm, Robert G., *Discriminatory Housing Statements and § 3604(C): A New Look At The Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, (2001) 12
Schwemm, Robert G., *Housing Discrimination: Law and Litigation* (West 2001)..... 2
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Turner, M., *Discrimination in Urban Housing Markets: Lessons From Fair Housing Audits*, 3 Housing Policy Debate 185 (1991)..... 2, 10

INTEREST OF *AMICI CURIAE*

The National Fair Housing Alliance ("NFHA") is a non-profit corporation that represents approximately eighty-five private, non-profit fair housing organizations throughout the country. NFHA was founded in 1988 to lead the battle against housing discrimination and ensure equal housing opportunity for all people. Through education, outreach, policy initiatives, advocacy and enforcement, NFHA promotes equal housing, lending, and insurance opportunities. Relying on the Fair Housing Act, NFHA and its members have undertaken important enforcement initiatives in cities and states across the country; those efforts have contributed significantly to the nation's efforts to eliminate discriminatory housing practices within the real estate industry.[1]

AARP is the nation's leading organization for people age 50 years and older with 35 million members nationwide. At the national and state level, AARP is actively involved in eliminating barriers to homeownership through research, advocacy, education and litigation. The Fair Housing Act has been an important tool in AARP's pursuit of this goal on behalf of its members.

Congress enacted the Fair Housing Act of 1968 ("FHA" or "Act") to deter discrimination in the real estate industry, to compensate its victims, and to encourage residential desegregation. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 211, 212 (1972). "Congress was aware that the measure would have a very broad reach, and indeed the legislation was seen as an attempt to alter the whole

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

character of the housing market." *Mayers* v. *Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring).

Yet "[h]ousing in the United States continues to be characterized by extremely high levels of racial segregation and unlawful discrimination." Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 2:1 (2001).[2] A 1991 study concluded that "black and Hispanic homeseekers experience discrimination roughly half of the times that they visit a rental or sales agent to inquire about advertised housing opportunities." M. Turner, *Discrimination in Urban Housing Markets: Lessons from Fair Housing Audits* 3 Housing Policy Debate 185, 188 (1991):

> There can be no doubt that the stubborn persistence of segregation is partly the result of discriminatory housing market practices – practices that create barriers to minority housing search and location choice, that discourage minority homeseekers from obtaining housing in predominantly white neighborhoods, and that prevent some white homeseekers from considering housing opportunities in racially mixed or minority neighborhoods. [*Id.*]

See also Schwemm, *supra* § 2:4 (citing studies).

Amici are committed to the vigorous enforcement of the FHA in order to fulfill the promise and achieve the purposes of the Act. As set forth *infra*, a critical component of effective FHA enforcement is the imposition of vicarious liability on persons, such as property owners and licensed real estate brokers, who control or effectively control actors engaging in discriminatory housing practices and who are in a position to prevent discrimination. *Amici* therefore file this brief in support of respondents, urging affirmance.

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[2] Professor Schwemm is one of the counsel to respondents in this Court.

SUMMARY OF ARGUMENT

As petitioner acknowledges, under the Fair Housing Act ("FHA"), a *corporate* property owner or brokerage is vicariously liable for the discriminatory acts of corporate agents. Although there is nothing in the language, history, or purposes of the FHA or in the law of agency to support his proposed distinction, Meyer nonetheless takes the position that *individual* property owners and real estate brokers are never vicariously liable for the acts of their agents. The questions for this Court, accordingly, are the appropriate test and scope of vicarious liability for individuals under the FHA and whether such liability extends to Meyer.

In this brief, *amici* show that the FHA, like all other federal civil rights statutes, imposes vicarious liability upon entities and individuals. The common law of agency, informed by the FHA's purposes, determines the scope of vicarious liability under the Act. Meyer, the designated broker, president, and sole shareholder of the small, closely-held brokerage of Triad, Inc., had a legal obligation to supervise and control the actions of Triad's real estate salespersons, including Grove Crank, the real estate salesperson who discriminated against the Holley family. Under the law of agency, Meyer is Crank's principal and is vicariously liable for Crank's discrimination in this case.

The language, history, and purposes of the Act harmoniously point to vicarious liability under the Act. As a general matter, "[t]he language of the Act is broad and inclusive," see *Trafficante*, 409 U.S. at 209. That general truth has full application to the specific legal question here. The Act does not specify or limit potential defendants; instead it defines unlawful conduct and imposes liability, without limitation, on "*any person*" who engages in such conduct. 42 U.S.C. § 3602 (emphasis supplied). "Person" is defined to include corporations and other artificial be[illegible]s demonstrating

that Congress contemplated imposition of vicarious liability for discriminatory housing practices.

The pertinent legislative history likewise reflects Congress' intention not to limit categories of potential defendants under the Act. An earlier version of the Act, which listed numerous categories of defendants, was abandoned in favor of the unrestricted language ultimately enacted. See *infra* at 12-14.

The generous statutory language is the result of the breadth and importance of Congress' purposes and the factual context of the discrimination addressed by the Act. The FHA begins by declaring that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. In pursuit of this policy, Congress sought to deter discriminatory housing practices, to compensate victims of discrimination, and to support desegregation.

Put bluntly, these ends cannot be achieved unless liability is imposed on those who control or have a right to control those who discriminate in the housing industry. The housing market consists of millions of transactions, largely involving individuals and small businesses. In addition, "[r]enting or buying a home is a complex process, consisting of many different stages at which discrimination may occur," Turner, *supra* at 189. As a result, the housing market provides numerous opportunities for discrimination by a multiplicity of different types of actors, including those individuals who control or have the ability to control small real estate brokerages. The imposition of vicarious liability on persons who control or who are in a position to control the actions of those who engage in discriminatory housing practices is necessary to fulfill Congress' ambitious purposes and goals.

Acknowledging Congress' intent comprehensively to address a deep-seated, persistent social problem, this Court has stated that the Act should be given a "'generous construction.'" *City of Edmonds* v. *Oxford House, Inc.*, 514

U.S. 725, 731 (1995) (quoting *Trafficante*, 409 U.S. at 212). In determining the scope of vicarious liability under the FHA, the lower courts have obeyed this instruction: Every federal court to consider the question has applied the common law of agency, informed by the purposes of the Act, and determined that it is appropriate broadly to impose respondeat superior liability for discriminatory housing practices under the Act. Respondeat superior liability, by its nature, imposes upon principals, such as property owners and real estate brokers, a non-delegable duty to ensure that their agents do not engage in discriminatory housing practices while acting within the scope of their agency. See cases *infra* at 19-20, 25-26.

Moreover, although Congress did not precisely delineate the boundaries of vicarious liability under the FHA, it delegated authority to the Secretary of the Department of Housing and Urban Development ("HUD") to administer and implement the Act. See 42 U.S.C. § 3614. The Secretary enacted regulations defining persons against whom administrative complaints may be filed, a group that is coextensive with the group against whom civil complaints may be filed. See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 104, 108 (1979). HUD's regulations expressly adopt the well-settled principles of respondeat superior liability described above, principles that were embodied in FHA case law at the time the regulation was promulgated. See 53 Fed. Reg. 24,185 (June 27, 1988) (citing numerous cases); see also 24 C.F.R. §103.202(b) (2000) (plain language regulation that does not alter the meaning of its predecessor). HUD's regulation falls comfortably within the scope of its authority to administer and interpret the FHA and is entitled to deference. See *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984).

The legal framework for analysis of vicarious liability under the FHA mirrors the legal framework for numerous federal statutes. The same framework is applied in actions against private parties under Title VII, the ADEA, the ADA,

section 1981, section 1982, and the Sherman Act. See *infra* at 19-20. Consistent with its interpretation of these statutes, this Court should hold that under the FHA, a principal is liable for the discriminatory housing practices of an agent acting within the scope of his or her agency.

The parties agree that Triad, Inc., a real estate brokerage, is vicariously liable for the discriminatory acts of Grove Crank, th real estate salesperson who discriminated against the Holley family. That leaves for decision only the question whether under agency principles, Meyer is also liable. Plainly, he is. Meyer was the sole licensed broker of Triad, and any real estate salesperson at Triad worked under Meyer's license and his supervision and control. Meyer was a licensed professional who was subject to regulatory sanction for, *inter alia*, failure adequately to supervise Crank. Cal. Bus. & Prof. Code §§ 10159.2, 10175-10185. As president, sole owner, and supervising corporate broker of a small, closely-held brokerage such as Triad (an entity typical of those involved in millions of real estate transactions annually), Meyer had a legal duty to supervise Crank, was in a position to control Crank, and was also the sole beneficiary of acts within the scope of Crank's agency. Holding Meyer responsible for the discrimination of those operating under his license and supervision is not only consistent with the unrestricted statutory language and HUD's interpretation of that language, but also is critical to the achievement of Congress' purposes in enacting the FHA.

This does not entail an abrogation of general principles of corporate law. Nor does holding Meyer liable mean that corporate officers and shareholders generally will be deemed vicariously liable for the discriminatory acts of corporate agents committed within the scope of their agency. Meyer's liability flows from his ability and obligation as licensed broker, president, and owner to control the conduct of Triad's real estate salespersons. Many corporate officers and shareholders have no such unique relationship with individual

corporate agents. In the corporate setting, moreover, control and benefit are often substantially diluted; many corporate officers and shareholders will have neither sufficient control nor reap sufficient benefit to justify imposition of liability under agency principles.

In addition, Meyer acknowledges that he would be liable for his own misdeeds. Under the FHA, such misdeeds include the negligent supervision of salespersons that Meyer's professional license legally obligated him to supervise and control. Finally, Meyer could be held liable under a veil-piercing analysis, an issue the lower courts did not reach.

For all these reasons, Meyer may be held liable for the FHA violation that occurred in this case.

ARGUMENT

The Fair Housing Act was enacted "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. It prohibits specified types of discrimination in any aspect of a transaction relating to the sale, rental or financing of dwellings. See 42 U.S.C. §§ 3604, 3605, 3606, and 3617.

The FHA establishes three mechanisms by which such discriminatory housing practices can be addressed and remedied: (i) an administrative complaint filed with the Secretary of HUD, 42 U.S.C. § 3610; (ii) a private civil action filed in federal district court, *id.* § 3613; and (iii) an action by the Attorney General of the United States filed in federal district court, *id.* § 3614. "Complaints by private persons are the primary method of obtaining compliance with the Act." *Trafficante*, 409 U.S. at 209.

This case involves a private civil action, alleging intentional discrimination in housing practices because of race or color. The parties agree that a defendant is not vicariously liable under the FHA simply because he or she is

a corporate officer or shareholder. This status, however, does not shield from vicarious liability a defendant who is in fact the principal of a corporate agent who discriminates. *Amici* show that the FHA imposes vicarious liability pursuant to the federal common law of agency, informed by the purposes of the Act, and that Meyer is vicariously liable for Crank's discrimination here.

1. *The Statutory Language.* The text of the statute is "[t]he starting point in every case involving construction of a statute." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976). The FHA does not limit in any way the class of persons or entities that may be held liable for discriminatory housing practices. The operative sections of the Act defining prohibited conduct state that "[i]t shall be unlawful to [engage in certain conduct]." See §§ 3604, 3606, 3617. In section 3606, the operative language further specifies that "[i]t shall be unlawful for *any* person or other entity whose business includes engaging in real estate-related transactions to discriminate. . . ." (Emphasis supplied.) This language contains no hint of limitation on the class of potential defendants. "The word 'any' excludes selection or distinction. It declares [the category] without limitation." *Citizens' Bank* v. *Parker*, 192 U.S. 73, 81 (1904). See also *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993).

Moreover, the FHA broadly defines "person" to "include[] one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries." See § 3602. Because corporations and other artificial entities can be held liable *only* through the acts of others, *i.e.*, only under a theory of respondeat superior liability, Congress' definition of "person" to include "corporations" and other artificial entities necessarily entails congressional approval for respondeat

superior liability and related agency theories under the FHA. Cf. *United States* v. *A&P Trucking Co.*, 358 U.S. 121, 126-27 (1958) (holding that Congress' decision to define a "person" potentially liable under the Motor Carrier Act to include "copartnerships" showed that the partnership could be liable under respondeat superior "quite apart from the participation and knowledge of the partners as individuals").

The inclusive statutory text also makes clear that the Act was not drafted to respond to discrimination by specified categories of defendants. Instead, the "unmistakable focus" of the statutory language is the protection of "the benefited class." *Cannon* v. *University of Chi.*, 441 U.S. 677, 691 (1979). Because the text does not limit the class of potential violators and is instead directed toward the rights of a protected class, it is most naturally read as extending liability to any person or other entity with effective control over the housing transaction at issue.

On a more general level, this Court has previously recognized that "the language of the Act is broad and inclusive," *Trafficante*, 409 U.S. at 209, and has several times stated that the Act should be given a "'generous construction.'" *City of Edmonds*, 514 U.S. at 731 (quoting *Trafficante*, 409 U.S. at 212). Indeed, in *City of Edmonds*, this Court narrowly construed an exception to the FHA's coverage based on the general rule that the Act should be generously construed to serve its purpose of preventing and remedying discriminatory housing practices. The Court stated that "we regard this case as an instance in which an exception to 'a general statement of policy' is sensibly read 'narrowly in order to preserve the primary operation of the [policy].'" *Id.* at 731-32 (quoting *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989)). *A fortiori*, the Court should not engraft limitations on the class of defendants liable for discriminatory housing practices where the FHA contains no such limitations. Instead, the Court should give the Act a generous construction to provide for liability where doing so

would "preserve the primary operation of the [Act's] policy." *Id.* Specifically, the Court should hold that any person or entity with effective control over a housing-industry transaction bears responsibility for commission of a discriminatory housing practice during that transaction.

The imposition of liability on those with effective control over housing-industry transactions is also necessary to achieve the purposes of the FHA. Congress intended to achieve fair housing "throughout the United States," by deterring discrimination, compensating its victims, and supporting desegregation. 42 U.S.C. § 3601. Discrimination is, however, extremely difficult to combat in the housing industry for several reasons. First, individual buyers and renters are not regular participants in the market. They enter the market for a single transaction and are ill-positioned to detect or challenge single acts of discrimination (*i.e.*, steering to a neighborhood largely composed of members of the buyer or renter's racial group). See Robert G. Schwemm, *The Private Enforcement of the Federal Housing Act*, 6 Yale L. & Pol'y Rev. 375, 379-81 (1988).

Second, and critically here, the housing industry consists of millions of transactions among individuals and small and large businesses. "Renting or buying a home is a complex process, consisting of many different stages at which discrimination may occur."[3] Turner, *supra* at 189.[4]

[3] As Turner explains:

> Discrimination can occur if the housing opportunity is advertised or marketed in such a way that qualified minority homeseekers do not learn about it, if agents refuse to do business with minority customers or treat them unfavorably in their initial encounter, if agents fail to follow up business with minority customers, if the final terms of sale or lease for minority customers are unfavorable, or . . . if minority customers are unable to obtain mortgage financing or homeowners' insurance. [Turner, *supra* at 189.]

[4] This practical reality is also reflected in the many different roles played by defendants in FHA cases. *See, e.g.*, *Alexander* v. *Riga*, 208 F.3d 419 (3d Cir. 2000) (joint owner who did not participate in co-owner's discrimination), *cert. denied*, 531 U.S. 1069 (2001); *Jankowski* v. *HUD*, 91 F.3d 891 (7th Cir. 1996) (building manager, corporation that owned the building, and managing partner and investor in the building); *City of Chi.* v. *Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (7th Cir. 1992) (sole shareholder, chief executive officer, corporation and sales agents); *Green* v. *Century 21*, 740 F.2d 460 (6th Cir. 1984) (real estate agents and real estate agency); *Davis* v. *Mansards*, 597 F. Supp. 334 (N.D. Ind. 1984) (rental agents, rental manager, and management company); *Steward* v. *Furton*, 774 F.2d 706 (6th Cir. 1985) (owner and manager of trailer park, lessee of trailer pad); *Marya* v. *Slakey*, 190 F. Supp. 2d 95 (D. Mass. 2001) (landlord and tenant); *Woods* v. *Foster*, 884 F. Supp. 1169 (N.D. Ill. 1995) (non-profit organization); *Williamson* v. *Hampton Mgmt. Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972) (desk clerk of management company); *Schroder* v. *DeBartolo*, 879 F. Supp. 173 (D.P.R. 1995) (condominium's board of directors); *Fenwick-Schafer* v. *Sterling Homes Corp.*, 774 F. Supp. 361 (D. Md. 1991) (real estate developers); *Ragin* v. *Steiner, Clatman & Assocs.*, 714 F. Supp. 709 (S.D.N.Y. 1989) (advertising agency); *Seaphus* v. *Lilly*, 691 F. Supp. 127 (N.D. Ill. 1988) (neighbor).

Discrimination in housing is most frequently caused not by a single act of discrimination having widespread impact, but by the discrete acts of individual property owners and real estate brokers and agents. Indeed, a significant number of real estate transactions involve small brokerages, such as Triad, Inc.; the routine business of the housing industry is carried out by the myriad decisions of agents working for small brokerages. It is not possible to deter and compensate for discrimination unless persons with effective control over these agents are liable for the agents' discriminatory acts.

The generous language of the FHA focuses on benefiting a protected class, imposes no limitation on the class of potential defendants, and makes clear that some vicarious liability is contemplated. In light of the nature of the housing industry, the imposition of vicarious liability is necessary to achieve Congress' important purposes in enacting the FHA. "[M]eaning [is] imparted to [the words of the statute] by the mischief to be remedied." *Duparquet, Huot & Moneuse* v.

Evans, 297 U.S. 216, 221 (1936). The statutory text thus strongly supports broad vicarious liability for those persons who control or have a right to control housing-industry actors who discriminate.

2. *The Legislative History.* The legislative history fully supports this reading of the text. The FHA was the culmination of a process that began with a proposal by President Johnson in 1966. Its substantive provisions changed very little from those set forth in that proposal, but some evolution in the language occurred that is relevant here.

As enacted, the FHA's substantive provisions state simply that "[i]t shall be unlawful" to engage in specified discriminatory practices or that it shall be unlawful for "any person or entity whose business includes engaging in real estate-related transactions" to discriminate. See *supra* at 8. President Johnson's initial proposal, however, had listed the defendants to whom the central prohibition would apply:

> It shall be unlawful for the owner, lessee, sublessee, assignee, or manager of, or other person having the authority to sell, rent, lease, or manage, a dwelling or for any person who is a real estate broker or salesman, or employee or agent of a real estate broker or salesman [to engage in discriminatory housing practices]. [112 Cong. Rec. 18,117 (1966).]

A memorandum provided to the House of Representatives stated that the list was intended to be "all inclusive." *Id.*

In response, the House Judiciary Committee altered the President's proposal. It limited those liable under the FHA to "real estate professionals and other persons in the business of building, developing, buying, selling, renting, or leasing housing, thereby excluding homeowners and other non-professionals from coverage." Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(C): A New Look At The Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 201-02 (2001).[5]

In 1967, however, Senator Mondale proposed S. 1358, which abandoned any attempt to identify potential defendants in FHA actions and employed the "[i]t shall be unlawful . . ." formulation. During roughly the same time, the House of Representatives was considering H.R. 2516, a civil rights bill without any fair housing title. The Senate bill was strongly opposed by the National Association of Real Estate Boards (predecessor of the National Association of Realtors) and numerous state realtor organizations, including California. See, *e.g.*, *Fair Housing Act of 1967: Hearings on S.1358, S. 2114, and S.2280 Relating to Civil Rights and Housing before the Subcomm. On Housing and Urban Affairs of the Sen. Comm. On Banking and Currency*, 90th Cong. 437-57 (1967); *The Civil Rights Act of 1967: Hearings on S.1026, S.1318, S.1359, S.1362, S.1462, H.R. 2516 and H.R. 10805 before the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary*, 90th Cong. 491-97 (1967); *The Civil Rights Act of 1967: Hearings on S.3296, Amendment 561 to S.3296, S.1497, S.1654, S.2864, S.2923, and S.3170*, 89th Cong. 418-39, 439-52, 489-92, 524-37, 864-67, 877-83, 883-89, 918-928, 1058-62, 1062-74, 1082-1089, 1653-64 (1966). Witnesses in the hearings testified that realtors were a substantial source of discriminatory housing practices and their product (segregation). See, *e.g.*, *Hearings on S.1026, etc.*, *supra*, 90th Cong. at 206, 360; *id.* at 406-07 (a realtor sympathetic to the bill identified as the principal external

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[5] Specifically, this version of House Bill 14765, passed by the House on August 9, 1966, provided that "It shall be unlawful for any person who is a real estate broker, agent, or salesman, or employee or agent of any real estate broker, agent, or salesman, or any other person in the business of building, developing, selling, renting, or leasing dwellings, or any employee or agent of any such person" to engage in discriminatory housing practices." 112 Cong. Rec. 18,112 (1966).

reason for the perpetuation of residential segregation "[t]he policies and practices of those engaged in real estate").[6]

Nonetheless, when H.R. 2516 was passed by the House, and sent to the Senate for consideration in January 1968, Senators Mondale and Brooke sponsored S.1358 as an amendment to the House bill. Jean E. Dubofsky, *Fair Housing: A Legislative History And A Perspective*, 8 Washburn L.J. 149, 151-52 (1969) (citing 114 Cong. Rec. S980-83 (daily ed. Feb. 6, 1968)). The bill met with opposition, but Senator Dirksen and others worked out a compromise in the form of a substitute amendment to H.R. 2516. *Id.* at 154, 156-57. Like S.1358, that amendment employed the "[i]t shall be unlawful . . ." formulation. That compromise, however, might not have been enacted, but for two events that followed.

First, on March 1, 1968, the Kerner Commission released its report on the civil disorders that had wracked America, with its blunt admonition that "America is dividing into two societies, black and white, separate and unequal," and its recommendation that the federal government enact a comprehensive, enforceable open housing law covering the sale and rental of all property. Dubofsky, *supra* at 158 (quoting *The National Advisory Commission on Civil Disorders Report* (1968)). Second, on April 4, 1968, Martin Luther King was assassinated. On April 10, "with National Guard troops called up to meet riot conditions in Washington, still in the basement of the Capitol, the House debated fair housing." *Id.* at 160. The bill passed, and was signed by President Johnson on April 11, 1968.

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[6] Until at least 1950, the NAR's Code of Ethics provided that realtors "should never be instrumental in introducing into a neighborhood . . . members of any race or nationality, or any individual whose presence will clearly be detrimental to property values in the neighborhood." Rose Helper, *Racial Policies and Practices of Real Estate Brokers* 224 (Press 1969).

The "[i]t shall be unlawful . . ." formulation became law without any limitation on the class of potential defendants. In light of this history, including the record of opposition and discrimination by the real estate industry, the fulfillment of Congress' purpose requires a generous construction of the class of persons liable for unlawful housing practices, including those real estate professionals with effective control over housing transactions where discrimination occurs.

3. *HUD's Expert Interpretation of the Statute It Administers.* Congress has delegated authority to implement and administer the FHA to HUD. See 42 U.S.C. § 3608 ("[t]he authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development"). HUD's regulations authorize the filing of administrative complaints against all persons with effective control over persons who engage in discriminatory housing practices within the scope of their agency. In addition, decisions of the Secretary and Administrative Law Judges adjudicating complaints filed under the HUD regulations have consistently interpreted the FHA to make such persons liable. This HUD interpretation is entitled to deference under *Chevron*, 467 U.S. at 843-45. See *Trafficante*, 409 U.S. at 210 (HUD's "consistent administrative construction of the Act" is "entitled to great weight"); *Gladstone, Realtors*, 441 U.S. at 107 (HUD's "interpretation of the [FHA] ordinarily commands considerable deference").

HUD's statutory interpretation occurs in the context of the administrative complaint process, but that interpretation has full application to private civil actions under the FHA. The administrative complaint process and the private civil action under the FHA are "alternative" or "parallel" remedies for discriminatory housing practices and have the same scope. See *Gladstone, Realtors*, 441 U.S. at 107-08 (holding that nothing in the statutory text, legislative history, or administrative interpretation of the FHA suggested a different scope for the private civil action and the administrative

enforcement action). Cf. also *NCAA* v. *Smith*, 525 U.S. 459, 467 n.5 (1999) (rejecting the argument that the scope of the private right of action to enforce Title IX of the Education Amendment of 1972 differs from the scope of the government's enforcement authority).

In 1984, pursuant to the statutory delegation of rulemaking authority, the Secretary of HUD issued proposed regulations governing the administrative complaint process under the FHA, including a regulation setting forth the "persons against whom a complaint may be filed." 49 Fed. Reg. 40,528, 40,533 (Oct. 16, 1984). In explaining his proposed rule, the Secretary stated that a complaint may be filed against any person engaged in, or about to engage in, discriminatory housing practices *and* further that "any person who directs or controls or who has the authority to direct or control the conduct of a person is responsible for the discriminatory housing practices by such other person." *Id.* He explained that this provision was "based on judicial precedents that persons involved in the sale, rental or financing of dwellings have a nondelegable duty to assure that all conduct relating to any aspect of the sale, rental or financing of dwellings complies with the Fair Housing Act and that a person who supervises, directs or employs other persons can be legally responsible for actions of such other persons which violate the Fair Housing Act." *Id.* (citing numerous cases).

On June 27, 1988, the Secretary issued his Final Rule determining "persons against whom complaints may be filed." 53 Fed. Reg. 24,184-85. He noted that the National Association of Realtors objected to the regulation on the ground that it imposed absolute liability on a principal. The Secretary denied any such intent, explaining that:

> the intent, in proposing paragraph (b), was to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to the liability of a principal for acts of an agent. . . . . HUD has revised the language of paragraph (b) of §§ 105.13 to provide that a complaint

> may be filed against a directing or controlling person with respect to the discriminatory acts of another *only if the other person was acting within the scope of his or her authority as employee or agent of the directing or controlling person.*" [*Id.* (emphasis supplied).][7]

In 1999, the Secretary promulgated an interim rule revising these regulations to use "plain language" and make the regulations more understandable. The Secretary specifically stated that the "rule does not change the substance of the existing fair housing complaint processing regulations." 64 Fed. Reg. 18,538-39 (Apr. 14, 1999). And, indeed, while the revised § 103.20 no longer appears to describe the persons against whom complaints may be filed, § 103.202 of the final plain language regulation indicates that HUD will serve notice on "any person who directs or controls, or who has the right to direct or control, the conduct of another person who is involved in a fair housing complaint." See 24 C.F.R. § 103.202(b) (2000).

Finally, even if the plain language regulation were deemed a departure from the prior regulation (which it is not), that change would be irrelevant here. The prior regulation was in effect at the time of the incident in question, and changes to the regulation may not be retroactively applied. See *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988) (holding that statutory grants of rulemaking authority do not encompass retroactive rulemaking authority unless that power is conveyed by express terms). Thus, HUD's prior regulation,

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[7] *See* 24 C.F.R. § 105.13 (1988). On January 23, 1989, the Secretary issued a Final Rule implementing the amendments to the FHA in the Fair Housing Amendments Act of 1988, but made no changes in the rules governing the types of persons against whom fair housing complaints could be filed. 54 Fed. Reg. 3232, 3260. The Secretary rejected the comments seeking changes in the rule as promulgated and adopted in 1988, saying that the comments "have presented no argument that convinces the Department that its current analysis of the case law on this point is incorrect." *Id.*

interpreting the scope of the FHA, is entitled to *Chevron* deference in this case.

The expert agency that administers the FHA has interpreted it to impose vicarious liability based upon common law principles of agency, and that interpretation is entitled to deference from the courts.

4. *Delineating the Precise Scope of Vicarious Liability Under the FHA.* (a) Petitioner agrees that, under the FHA, *corporate* property owners and brokerages are vicariously liable for the discriminatory acts of corporate agents, but argues that *individuals* are not. Thus, the issues before this Court are the appropriate test and scope for vicarious liability for individuals under the FHA and whether Meyer is liable.

Respondeat superior liability is simply one of several types of vicarious liability (*e.g.*, conspiracy liability, aiding and abetting liability, strict liability). Under the FHA, respondeat superior liability exists whenever a principal would be liable for the conduct of an agent under traditional principles of agency law, as informed by the purposes of the FHA. Cf. *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999) (analogous holding in Title VII context).

Respondeat superior liability is deeply rooted in western law and jurisprudence. Although its origins are uncertain, "[m]ost of the English cases that provided the genesis of the modern respondeat superior doctrine were decided in the late 1600s and early 1700s." R. Prentice, *Conceiving The Inconceivable and Implementing the Preposterous: The Premature Demise of Respondeat Superior Liability Under Section 10(b)*, 58 Ohio St. L.J. 1325, 1367 (1997) (citing decisions and scholarly authority). See also 1 William Blackstone, *Commentaries on the Law of England* 429-30, 432 (1765) ("the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer: he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the

blame on his agent. The reason of this is uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself").

Every court to consider the question has held that liability for discriminatory housing practices under the FHA is not limited to the individuals or entities directly involved in the transaction at issue – *i.e.*, that liability may be vicariously imposed upon individuals and corporate entities. See, *e.g.*, *Cabrera* v. *Jakabovitz*, 24 F.3d 372 (2d Cir. 1994); *Matchmaker Real Estates Sales Ctr.*, 982 F.2d 1086; *Walker* v. *Crigler*, 976 F.2d 900 (4th Cir. 1992); *Northside Realty Assocs., Inc.* v. *United States*, 605 F.2d 1348 (5th Cir. 1979); *Marr* v. *Rife*, 503 F.2d 735 (6th Cir. 1974). Specifically, the courts have applied respondeat superior liability, authorizing "the imposition of liability upon a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant." *General Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 392 (1982) (citing *Restatement (Second) of Agency* §§ 215-216, 219 (1958); W. Prosser, *Handbook of the Law of Torts* §§ 69-70 (4th ed. 1971)). Agency is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.* at 392 (quoting *Restatement* § 1). Respondeat superior liability, accordingly, makes the principal liable for the wrongful acts of the agent committed within the scope of his or her agency.

There is nothing remarkable about the imposition of respondeat superior liability in a private civil action enforcing federal rights and obligations against private actors and entities. That is the rule under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which forbids employers to discriminate against employees because of race, color, religion, sex or national origin. See *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 760 (1998). See also *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 802 (1998) ("it makes sense to

hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority"). Employers are liable for the discriminatory conduct of their agents pursuant to a federal common law of agency, as set forth in the Restatement (Second) of Contracts and as modified to accord with Congress' purpose and goals in enacting Title VII. Applying this framework, this Court has held that employers are vicariously liable for the discriminatory acts of their agents under Title VII, even though they did not know, could not have known, and would not have approved of the discrimination at issue. See *Meritor Sav. Bank* v. *Vinson*, 477 U.S. 57, 70-71 (1986).

The same analytical framework is applied under the Age Discrimination in Employment Act and the Americans With Disabilities Act. See, *e.g.*, *EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999); *Mason* v. *Stallings*, 82 F.3d 1007 (11th Cir. 1996); *DeVito* v. *Chicago Park Dist.*, 83 F.3d 878 (7th Cir. 1996); *Birkbeck* v. *Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1996); *Breeding* v. *Arthur J. Gallagher & Co.*, 164 F.3d 1151 (8th Cir. 1999); *Quinones* v. *City of Evanston, Ill.*, 58 F.3d 275 (7th Cir. 1995). The doctrine of respondeat superior also applies in civil actions against private parties under § 1981, 42 U.S.C. § 1981 (prohibiting race discrimination in contracting and in legal proceedings), and § 1982, 42 U.S.C. § 1982 (prohibiting race discrimination in the sale and rental of property). See *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 392-93; *Berger* v. *Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1430 (D.C. Cir. 1988); *Cabrera*, 24 F.3d at 385-88; *Matchmaker Real Estate Sales Ctr.*, 982 F.2d at 1096. Finally, these traditional principles of agency law also govern the application of vicarious liability in federal antitrust actions. See *American Soc'y of Mech. Eng'rs* v. *Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982) (applying "traditional agency law" to impose treble damages upon a principal for the acts of its agents taken with apparent authority, saying

that "[s]ince treble damages serve as a means of deterring antitrust violations and compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold [the defendant] liable for the acts of agents committed with apparent authority") (citing *Restatement* § 217C cmt. c at 474). "There is a general judicial acceptance for applying common law agency principles to federal statutes," including the FHA. B. Black, *Application of Respondeat Superior Principles to Securities Fraud Claims Under RICO*, 24 Santa Clara L. Rev. 825, 837 (1984).[8]

The imposition of respondeat superior liability under the FHA is wholly consistent with the law of agency, the jurisprudence of the FHA, and the judicial construction of other federal civil rights statutes. Nothing in any of these areas of law supports petitioner's argument that respondeat liability under the FHA should be confined to corporations.

(b) That leaves only the question whether Meyer controlled or had the right to control Crank for purposes of FHA analysis. On the facts of this case, Meyer's relationship with Triad's real estate salespersons comfortably satisfies the test for agency under the FHA.

First, Meyer's status as designated broker of Triad by itself is sufficient to establish that he is Crank's principal for FHA purposes. Under California law, a corporation cannot be licensed to do business as a real estate brokerage without designating an individual with a broker's license as its designated officer/broker. Cal. Bus. & Prof. Code §§ 10130, 10131, 10159.2, 10211. The designated broker:

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[8] *See also* A. Conrad, *Enterprise Liability and Insider Trading*, 49 Wash. & Lee L. Rev. 913, 915-17 (1992) (describing the "triumph" of respondeat superior liability in the Western world's legal systems); R. Prentice, *supra* at 1361.

> shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required. [*Id.* § 10159.2(a).]

In addition, a designated broker's license may be suspended or revoked if "as a broker licensee, [he] failed to exercise reasonable supervision over the activities of his . . . salespersons; or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required." *Id.* § 10177(h). See *Nelson* v. *Department of Real Estate*, 161 Cal. App. 3d 939 (1984) (upholding suspension of designated broker's license for failure to supervise); 10 California Code of Regulations §§ 2725, 2780 (2002).

These provisions were enacted to "prevent unlicensed persons from obtaining authorization of a licensee to use that licensee's name and then proceed[ing] to carry on business free of any licensee participation or direction." Sen. Comm. on Bus. & Professions, *Staff Analysis of AB 985* (Cal. 1979). The legislation "stipulates that the designated officer named on the corporate license application assumes responsibility for officer's, employee's and salesperson's compliance with the provisions of the Real Estate Law," and "attempts to insure licensed supervision of real estate corporation activity by holding designated officers personally responsible for that supervision." *Id.* See also *Assembly Comm. on Labor, Employment and Consumer Affairs: Statement of Chairman Lockyer on AB 985* (Cal. 1979) ("[t]he only way that the active participation of the licensed individual can be ensured is by 'piercing the corporate veil' and making the individual licensee vulnerable to action on account of corporate misdeeds, or on account of failure to fulfill corporate

responsibilities"). The "entire statutory scheme requires the broker actively to conduct his brokerage business and to supervise the activities of his salesmen. It precludes salesmen from taking charge of or conducting a business . . . which requires a broker's license." *Grand* v. *Griesinger*, 325 P.2d 475, 481 (Cal. 1958). See also *Alhino* v. *Starr*, 112 Cal. App. 3d 158, 169 (1981) (California law imposes upon a broker the same obligation of undivided service and loyalty that it imposes on a trustee, including a duty of good faith and fair disclosure).[9]

The relationship between a designated broker and a salesperson created by state law by itself gives the former sufficient control over the latter to create an agency relationship under the FHA. Indeed, the FHA itself reflects that a state's licensing and regulation of brokers is an important indication that such brokers exercise control sufficient to make them responsible for discrimination under the Act. It does so by requiring HUD to share its findings of discriminatory housing practices with state regulatory authorities so that the latter, too, can respond to conduct unlawful under the Act. See 42 U.S.C. § 3612(g)(5).

In this case, moreover, there were several other important indicia of Meyer's control of Crank. Meyer was the sole licensed real estate broker of Triad, a small brokerage employing only a handful of agents. In addition, Meyer was the president of Triad at all relevant times, and thus its chief executive officer. Finally, Meyer was the sole shareholder of Triad, which was a closely-held corporation. He was, accordingly, the lone beneficiary of any salesperson action

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[9] Other States' schemes similarly establish relationships of agency between designated brokers and real estate salespersons. *See, e.g.*, *Century 21 Action Realty II v. Smith*, 533 So.2d 626 (Ala. Civ. App. 1988); *Timmerman* v. *Smith*, 413 So. 2d 627 (La. Ct. App. 1982); *Kimball Bridge Road at Big Creek* v. *Everest Realty Corp.*, 234 S.E.2d 673 (Ga. Ct. App. 1977); *Jory* v. *Bennight*, 542 P.2d 1400 (Nev. 1975); *Circle T Corp.* v. *Deerfield*, 444 P.2d 404 (Colo. 1968).

taken within the scope of employment. At the very least, these facts in combination with Meyer's status as designated broker created a relationship of control sufficient to constitute agency under the FHA.[10]

This analysis in no way compromises or departs from general principles of corporate law. Meyer's liability flows from the nature of his relationship with Crank. Holding Meyer liable does not mean that numerous corporate officers and shareholders routinely will be deemed vicariously liable for the discriminatory acts of corporate agents committed within the scope of their agency. Meyer's status as designated corporate broker, with its concomitant professional obligations, is critical in this regard. Many corporate officers and shareholders do not have such direct relationships with individual corporate agents. In addition, as both sole shareholder and president of a small, closely-held corporation, Meyer exercised extraordinary control over the corporation's agents and exclusively benefited from their actions within the scope of that agency. In a typical corporate setting, control and benefit are both indirect and diluted for shareholders and officers. The conclusion that Meyer is Crank's principal is therefore wholly consistent with the common law of agency and does not contravene the common law of corporations.

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[10] It makes no difference that California courts have not decided whether, under current law, there is a private civil cause of action against a designated real estate broker for negligent supervision of real estate salespersons. Indeed, no California state court has ruled on the question since the 1979 amendments to California law. A federal bankruptcy court concluded that these amendments had authorized such a cause of action; that decision was ultimately reversed. *See In re Grabau*, 151 B.R. 235 (1991), *rev'd*, 151 B.R. 227 (C.D. Cal. 1993). In any event, the scope of vicarious liability under the FHA is a federal question. The issue, accordingly, is whether the relationship between a designated real estate broker and real estate salespersons under his or her supervision is an agency relationship -- *i.e.*, one involving control or the right to control within the meaning of federal law.

5. *A Principal's Duty Not To Discriminate Is Non-Delegable.* To say that a principal's duty not to discriminate under the FHA is non-delegable is simply to say that the principal will be vicariously liable for his or her agent's discrimination. As this Court stated, "[i]n a sense, to characterize a duty as non-delegable is merely to restate the duty." *General Bldg. Contractors*, 458 U.S. at 396.

Under the FHA, all persons with control or the right effectively to control actors who engage in discrimination (*i.e.*, principals) have a non-delegable duty to ensure that such persons (*i.e.*, agents) do not discriminate. This is simply a different way of saying that under the FHA, principals are vicariously liable for the discrimination of their agents. See *Walker*, 976 F.2d at 904 ("Here we adopt the general rule applied by other federal courts that the duty of a property owner not to discriminate in the leasing or sale of that property is non-delegable"); *Green*, 740 F.2d at 465 ("a principal cannot free himself of liability by delegating a duty not to discriminate to an agent"); *Marr*, 503 F.2d at 742 (holding the owner of a real estate agency liable for the discriminatory acts of the agents because he "had at least the power to control the acts of his salesman").[11]

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[11] *See also United States* v. *Youritan Constr. Co.*, 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd*, 509 F.2d 623 (9th Cir. 1975) (holding a corporation and its sole shareholder who failed to supervise his managers and failed to establish procedural standards liable for discriminatory acts performed by property managers and employees of the corporation) ("[t]he discriminatory conduct of an apartment manager or rental agent is, as a general rule, attributable to the owner and property manager of the apartment complex, both under the doctrine of respondeat superior and because the duty to obey the law is non-delegable"); *Saunders* v. *General Servs. Corp.*, 659 F. Supp. 1042, 1059 (E.D. Va. 1986) ("[u]nder the Fair Housing Act, a corporation and its officers 'are responsible for the acts of a subordinate employee . . . even though these acts were neither directed nor authorized' . . . because the statutory duty not to discriminate is non-delegable"); *United States* v. *Real Estate Dev. Corp.*, 347 F. Supp. 776 (N.D. Miss. 1972) (holding the owner of an apartment complex liable for

Amici do not contend that a principal is liable for acts of an agent that are beyond the scope of agency or that a principal is liable for the acts of those who are not its agents. Our position is that where an agency relationship exists under the FHA, the "innocent" principal is vicariously liable for an agent's discriminatory acts, whether that principal is incorporated or not.

As described above, it is entirely commonplace in the law to impose liability on an "innocent" principal for the wrongful acts of an agent subject to that principal's control – *viz.*, to make a legal duty non-delegable. For example, in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 13-15 (1991), this Court held that the imposition of liability on an insurance company for the fraud committed by one of its agents without the company's knowledge or consent does not violate the company's right to due process. In so doing, the Court explained that holding an employer liable for the intentional fraud of its employees – even where the employer is innocent – "creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'" *Id.* at 14 (quoting *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U.S. 112, 116 (1927)). Similarly, in *Hydrolevel*, 456 U.S. at 572, this Court explained its decision to impose vicarious liability by stating that "[o]nly [the employer] can take systematic steps to make improper conduct on the part of

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the enforcement of a discriminatory rental policy by its general and resident managers where owner had endorsed the policy); *Williamson*, 339 F. Supp. 1146 (holding a property management company vicariously liable for the discriminatory acts of a desk clerk working at an apartment building that the company managed where the desk clerk had apparent authority to negotiate with potential lessees and where the discrimination occurred in the presence of the assistant manager who had authority to approve or disapprove of the conduct). *Cf. Dillon* v. *AFBIC Dev. Corp.*, 597 F.2d 556 (5th Cir. 1979) (holding that the property owner was not liable because he had entered into a contract for sale of the lot to a builder, depriving him of the right to control the marketing activities of the builder or the real estate broker and thus eliminating any agency relationship).

all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for [the employer] to take these steps"). See also *HUD* v. *Rucker*, 122 S. Ct. 1230, 1235 (2002) (upholding the government's no-fault eviction regulation because "[s]trict liability maximizes deterrence and eases enforcement difficulties").

In sum, although courts have characterized the duty not to discriminate under the FHA as non-delegable, courts have *not* held property owners and real estate brokers liable for their agents' acts when those acts are beyond the scope of agency. Instead, this characterization is simply a different way of saying that under the FHA, as under numerous other federal statutes, a principal is vicariously liable for the acts of an agent within the scope of agency.

6. *Broad Vicarious Liability Furthers The Policies of the FHA.* A generous conception of the scope of agency, in combination with respondeat superior liability, serves the FHA's purposes. Congress intended to compensate victims of discrimination, to deter discrimination, and to advance desegregation in the private housing markets by protecting the market's ability to function unimpeded by discrimination.

First, respondeat superior liability assists victims of discrimination seeking compensation. It is extremely difficult for plaintiffs injured by the discrimination of agents or employees to prove that the principal or employer was somehow careless in hiring or in supervision. Prentice, *supra* at 1376-77. Respondeat superior liability diminishes the need for such discovery, while still requiring the plaintiff to show both that an agency relationship existed and that the agent was acting within the scope of his or her authority. Moreover, respondeat superior liability helps ensure compensation for victims of discriminatory housing practices by expanding the group of responsible defendants to include all those with effective control over the conduct at issue.

Second, respondeat superior liability deters discrimination by inducing greater diligence and care in the hiring and supervision of agents and employees. See *Monell* v. *New York City Dep't of Health & Human Servs.*, 436 U.S. 658, 693 (1978) (respondeat superior rests on "the common sense notion that no matter how blameless an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had to bear the costs of accidents"); *Hydrolevel*, 456 U.S. at 572-73 ("[I]f . . . [the defendant] is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. 'Pressure will be brought on [it] to see to it that [its] agents abide by the law. Only [defendant] can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability inevitably will be a powerful incentive for [it] to take those steps. Thus, a rule that imposes liability . . . is most faithful to the congressional intent that the private right of action deter antitrust violations").

Finally, respondeat superior liability protects free competition and choice in the housing market. See Turner, *supra* at 188 ("discrimination per se prevents minority Americans from competing freely and equally in the housing market . . . . [and] prevents minority Americans from exercising freedom of choice in housing market transactions").

7. *Piercing the Corporate Veil.* The question whether a federal court may "pierce the corporate veil" under the FHA, and thus hold corporate owners liable for the acts of a corporation is a red herring here. Veil piercing is not a separate cause of action, but a remedial device or theory of recovery that applies where an individual owner or parent corporation *is*, in some legal sense, the corporation. 1 W. Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 41, at 603 (1990). Cf. also *Mass. Laborers' Health & Welfare Fund* v. *Starrett Paving Corp.*, 845 F.2d

23, 26 (1st Cir. 1988) (Breyer, J.) ("[w]hen state law pierces the corporate veil, where the owner is the corporation's alter ego, where state or other relevant federal law makes the owner liable, it is fairly easy to say that the *owner is the corporation*") (emphasis supplied). The decision whether to pierce a corporate veil is, therefore, subsidiary to the underlying cause of action.

When the underlying cause of action rests on a federal statute, the decision whether to pierce the corporate veil and hold an individual liable is necessarily informed by the policies and purposes of the federal statute at issue. This Court has recognized on numerous occasions that an incorporated entity "is not to be regarded as legally separate from its owners in all circumstances." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983). "In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." *Id.* at 630.

Veil piercing is the norm under federal statutes, including federal employment and civil rights statutes. See *United States* v. *Bestfoods, Inc.*, 524 U.S. 51 (1998) (authorizing veil piercing under CERCLA and making clear that, absent clear language to the contrary, it is the norm); *Bufco Corp.* v. *NLRB*, 147 F.3d 964, 969 (D.C. Cir. 1998) (describing the federal common law of veil piercing); *Radio & Mach. Workers* v. *Pleasant St. Corp.*, 960 F.2d 1080 (1st Cir. 1992) (same in ERISA context); *Lumpkin* v. *Evnirodyne Indus., Inc.*, 933 F.2d 449, 460-63 (7th Cir. 1991) (same). Veil piercing is consistent with the language of the FHA and best serves the congressional intent and purposes described *supra*. The critical point here, however, is that the question whether the corporate veil of Triad should be pierced (making Meyer liable for Crank's actions) is independent of the question whether Meyer is vicariously or directly liable Crank's acts.

8. *Meyer's Liability For His Failure to Fulfill His Professional Obligations.* Finally, all parties are in agreement

that Meyer may be held liable for violations of the FHA or other laws caused by his own acts or omissions. See *Bestfoods*, 524 U.S. at 65 ("[a]part from corporation law principles, a shareholder, *whether a natural person or a corporation*, may be liable on the ground that such shareholder's activity resulted in the liability") (citation omitted). As is set forth in respondents' brief, Meyer's failure to fulfill his legal obligation to supervise Crank may make him liable under the FHA for Crank's discrimination pursuant to several legal theories imposing direct liability. This issue was not addressed below and would be an appropriate subject for remand, if necessary.

* * * *

The FHA imposes vicarious liability upon principals for the acts of agents within the scope of agency. Crank was Meyer's agent and was acting within the scope of his agency. Accordingly, Meyer is liable for Crank's discrimination under the FHA.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

VIRGINIA A. SEITZ
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736-8015

JOHN P. RELMAN*
MEERA TREHAN
RELMAN & ASSOCIATES
1350 CONNECTICUT AVE. NW
WASHINGTON, D.C. 20036
(202) 728-1888

Counsel for Amici Curiae

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* Counsel of Record

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IN THE

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

v.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL ASSOCIATION OF OFFICIAL HUMAN RIGHTS AGENCIES IN SUPPORT OF RESPONDENTS

BRUCE V. SPIVA
Counsel of Record
JESSIE K. LIU
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for *Amicus Curiae* the International Association of Human Rights Agencies

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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Idaho Code § 54-2038 11

Kan. Stat. Ann. § 58-3060(b) 11

Ky. Rev. Stat. Ann. § 324.160(6) 11

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N.C. Stat. Ann. § 93A-2(b) 11

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S.C. Code Ann. § 40-57-135 11

S.D. Codified Laws § 36-21A-46.1(3) 11

Utah Code Ann. § 61-2-11(14) 11

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Wash. Admin. Code § 308-124D-061 11

Wyo. Stat. Ann. § 33-28-111(a)(ix) 11

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1949, the International Association of Official Human Rights Agencies ("IAOHRA") is a non-profit membership organization with its headquarters in Washington, D.C. IAOHRA's membership presently consists of approximately 160 human rights agencies in the United States and Canada. Most of IAOHRA's members are statutorily created bodies with authority for enforcing human rights and civil rights laws in their jurisdictions. IAOHRA seeks to foster human and intergroup relations, enhance human rights practices under law, and promote civil and human rights around the world. As part of its mission, it has led efforts to develop and enforce local, state, and national human and civil rights statutes.

IAOHRA is committed to the vigorous enforcement of the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq*. ("FHA" or "the Act"). As an association whose membership includes many local and state human rights agencies, IAOHRA is uniquely positioned to speak to the interaction between state and federal fair housing laws, and between state regulation of real estate brokers and those brokers' liability for violations of federal fair housing laws, both of which are important issues in this case.

Indeed, the United States Department of Housing and Urban Development ("HUD" or "the Department"), the federal agency responsible for enforcing the FHA, has determined that the fair housing laws for many states and localities, and the

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1/ The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than *amicus curiae* or its counsel contributed money or services to the preparation or submission of this brief.

administrative enforcement of these laws by the relevant state and local enforcement agencies, provide substantive rights and remedies for alleged discriminatory housing practices that are "substantially equivalent to those provided by the Fair Housing Act." 61 Fed. Reg. 53380, 53380-81 (Oct. 11, 1996); *see also* Robert G. Schwemm, *Housing Discrimination Law and Litigation*, App. C (2002) (identifying states and localities with fair housing laws that are "substantially equivalent" to the Fair Housing Act).

Moreover, when the Department receives complaints of violations of a state or local fair housing law that has been certified as substantially equivalent to the Act, it refers the complaint to the appropriate state or local agency. 24 C.F.R. § 115.204(a). Thus, state and local authorities, many of whom are IAOHRA's members, work hand-in-hand with HUD to enforce the Fair Housing Act and substantially equivalent statutes and ordinances to further the overarching goal of fair housing for all Americans. *Cf.* 65 Fed. Reg. 23432, 25434 (May 1, 2000) ("Oftentimes, the work of enforcing the provisions of the Federal Fair Housing Act and the substantially equivalent fair housing laws of States and local governments, requires crossing governmental (State/local/Federal) lines. It can require that public and/or private agencies work with the Federal government to complete a specific task.").

IAOHRA therefore files this brief in support of Respondents, urging affirmance of the decision below.

SUMMARY OF ARGUMENT

While we agree with Respondents and other *amici curiae* urging affirmance that established principles of vicarious liability support holding Petitioner liable for the discriminatory

acts of his agent Crank, we focus primarily upon a separate and independent basis for affirming the decision of the Ninth Circuit: as the designated broker-officer of an incorporated real estate firm, Petitioner had an affirmative duty reasonably to supervise the activities of his salespersons, including securing their compliance with the Fair Housing Act, and if he breached that duty, he is directly liable for violating the FHA.

The FHA's stated policy is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. In keeping with this mandate, the Act does not limit the universe of defendants who can be liable for discriminatory actions, and this Court has observed both that "the language of the Act is broad and inclusive," *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972), and that its complaint-filing provisions should be accorded a "generous construction," *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995). Moreover, as the Ninth Circuit recognized, HUD regulations historically have included within the FHA's purview "any person who directs or controls, *or has the right to direct or control, the conduct of another person* with respect to any aspect of the sale . . . of dwellings or the provision of brokerage services relating to the sale . . . of dwellings, if that other person, acting within the scope of his or her authority as the employee or agent of the controlling or directing person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice." 24 C.F.R. § 103.20 (1999) (emphasis added) (cited at JA 5). It follows that an individual who has a *duty* to control the conduct of another person also can be held liable under the Act for failing to take strong measures to prevent discrimination by that person. Indeed, the Act's ambitious goal of eradicating housing discrimination in this country would be impossible to achieve if those with a statutory duty to require

compliance with the Act could evade liability by consciously avoiding the exercise of their authority. Therefore, as it did in *Edmonds*, this Court should read the Act in such a way as to "preserve the primary operation of the policy" of the FHA. *Edmonds*, 514 U.S. at 732 (internal quotation marks and brackets omitted).

Petitioner and his supporting *amici* maintain that the Ninth Circuit's decision represents a wholesale departure from established principles of corporate law and deals a catastrophic blow to the real estate industry as we know it. Pet. Br. 10, 32; National Association of Homebuilders ("NAHB") Br. 4-5, 13; National Association of Realtors ("NAR") Br. 3, 18-19; California Association of Realtors ("CAR") Br. 14. According to Petitioner, the decision below "has, without exaggeration, opened the floodgates of litigation throughout the country." Pet. Br. 32. The burden of personal liability is so great, Petitioner claims, that no "sane individual" will assume it, and the nation's real estate corporations will perish. *Id.* Petitioner's supporting *amici* raise similar arguments. CAR Br. 13-16; NAHB Br. 12-15.

But as evocative as this rhetoric might be, it has very little to do with the case at hand. The Ninth Circuit properly reversed summary judgment and held that Petitioner is potentially liable, not solely as the owner or officer of a real estate corporation, but as its designated broker-officer. Under California law and the law of many other states, a real estate corporation's designated broker-officer is a licensed professional with an ongoing duty of supervision. Cal. Bus. & Prof. Code § 10159 ("Each officer of a corporation through whom it is licensed to act as a real estate broker is, while so employed under such license, a licensed real estate broker . . . ."); *id.* § 10159.2 (providing that designated broker-

officer "shall be responsible for the supervision and control of the activities conducted on behalf of the corporation"); *see also infra* note 6 (citing other state statutes). Recognizing that obligation, the Ninth Circuit reversed the district court's decision that Petitioner could not be liable as a matter of law. JA 71.

Thus, this is not a case in which an innocent corporate shareholder or officer is facing personal liability for the wrongdoing of employees in a remote branch of a vast corporation. And the decision below does not suggest that such a shareholder or officer ever would be held liable. Established principles of limited liability, which the decision below does not disturb, likely would bar personal liability in such a case. Nor is Petitioner facing strict liability as a designated broker-officer; it remains entirely possible for him to establish that he has met his various duties, or that Crank acted outside the scope of his employment. Accordingly, the challenged decision leaves established corporate law principles – and the American real estate industry – entirely intact.

ARGUMENT

I. PETITIONER HAD AN AFFIRMATIVE DUTY TO SUPERVISE CRANK'S COMPLIANCE WITH THE FHA.

The Ninth Circuit correctly reversed the district court's holding that Petitioner could not be liable under the Fair Housing Act for the discriminatory acts of a salesperson employed by the corporation of which he was the designated broker-officer. The Act places no limit on the class of potential defendants. Rather, it provides that "[i]t shall be unlawful" to engage in certain discriminatory conduct, 42 U.S.C. §§ 3604,

3606, 3617, and, more specifically, that "[i]t shall be unlawful for *any person* or entity whose business includes engaging in real estate-related transactions to discriminate," *id.* § 3605. Petitioner does not contest that he is a "person . . . whose business includes engaging in real estate-related transactions," but he argues that the Act should not be read to apply to him because such an interpretation would run afoul of established corporate law principles limiting officer and shareholder liability for the acts of the corporation's agents.

But, in fact, the decision below comports fully with corporate law. First, as argued by Respondents and other *amici* in support of affirmance, the FHA imposes *respondeat superior* liability upon Petitioner, as designated broker officer, broker-officer president, and sole shareholder of a small, closely-held brokerage, under traditional principles of agency law. Second, even if Petitioner were not vicariously liable for the actions of the corporation's salespersons, liability could arise from his violation of the duties placed upon him as the corporation's designated broker-officer under California law.

As *amici* supporting Petitioner correctly observe, real estate brokers work in a very highly regulated industry: every jurisdiction in the country requires real estate brokers to hold state-issued licenses. NAR Br. 10; CAR Br. 1. And while licensing requirements vary from state to state, most states impose significant and ongoing responsibilities on licensees. Patrick J. Rohan *et al.*, *Real Estate Brokerage Law and Practice* § 6.02-6.04, at 6-5 to 6-20 (2001) (describing activities subject to regulation and continuing education requirements). The overriding purpose of real estate regulation, as the model regulations promulgated by the National Association of Real Estate Law and Licensing Offices make clear, is to "protect the public health, safety and welfare." *Id.*

§ 6.06, at 6-29. The Fair Housing Act is one of the critical expressions of this public interest, and most states, including California, have reinforced their commitment to fair housing with legislation that is substantially equivalent to the FHA. Cal. Gov. Code § 12955; 61 Fed. Reg. at 53381; *see also* Robert G. Schwemm, *supra*, § 30:1, at 30-1 ("Most states and many localities have some form of fair housing law.").

A key feature of most jurisdictions' real estate regulations, and the one that lies behind the efforts of Petitioner and his *amici* to characterize this case as a straightforward matter of corporate law, is the possibility of entity licensing. Most states allow business entities to hold real estate brokers' licenses, and a small but significant proportion of brokers' licenses are held by corporations.[2] Certainly, the corporate structure offers many advantages for individual real estate brokers: they are particularly useful in facilitating the payment of commissions, Rohan, *supra*, § 4.05[6], at 4-52 to 4-53, and traditional principles of limited liability shield shareholders and, in some cases, officers from many forms of personal liability.

But, as with professional regulation of lawyers, doctors, and accountants, licensing regimes recognize that many of the responsibilities of real estate brokers must rest with an individual. *Real Estate Corporate Licenses*, Bill No. AB 985,

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2/ According to the California Association of Realtors, 14% of brokers' licenses in California are held by corporations. CAR Br. 6. Most of these corporations, again according to the Association's figures, seem to be very small firms: there is an average of 1.13 designated broker-officers per corporate license in California, and an average of 5.5 salespersons for each designated broker-officer. *Id.*; *see also* Rohan, *supra*, § 2.01[3][a], at 2-11 ("The residential real estate brokerage industry traditionally has been dominated, in terms of numbers of firms and volume of sales, by small brokerage firms.").

Hearings Before the Assembly Committee on Labor, Employment and Consumer Affairs (Cal. Apr. 24, 1979) ("The licensing of corporate 'persons' has always been problematic: the state is confronted with the dilemma of guaranteeing the professional competence and proficiency of a legal fiction. Traditionally, the problem has been solved by requiring the direct supervisory control of the corporation's professional actions by a licensed individual who is himself qualified."). Thus, even though a corporation might be the nominal licensee, a qualified individual within the corporation must be designated, and in some cases independently licensed, as the corporation's broker-officer. Rohan, *supra*, § 6.03[7], at 6-16. This designated broker-officer assumes responsibility for the corporation's compliance with the legal obligations imposed upon it by the relevant licensing regime.[3]

California follows this general practice, requiring an incorporated real estate firm to appoint an individual to serve as its designated broker-officer. Cal. Bus. & Prof. Code §§ 10211, 10159. Further, California law provides that

> The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

3/ For details of state licensing regimes, see Rohan, *supra*, § 6.07.

Cal. Bus. & Prof. Code § 10159.2. The corporation may "assign supervisory responsibility over salespersons licensed to the corporation" to other licensed broker-officers of the corporation, but only by resolution of the corporation's board of directors.[4]

The broker-officer is not excused from the professional responsibilities California imposes upon brokers who hold licenses as individuals by virtue of his affiliation with the corporation. Indeed, it is only through the designated broker-officer that any corporation can become eligible to hold a brokers' license at all.[5] Furthermore, Section 10159 of the

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4/ Thus, the California Association of Realtors's suggestion that one individual cannot supervise all the salespersons in a particular firm, especially in "corporate giants that may hire thousands of agents nationwide," CAR Br. 12-13, has no force. All unlicensed individuals must be supervised by a licensed broker, and Section 10159.2(b) provides a mechanism for effecting such supervision, even in a large organization:

> A corporate broker licensee that has procured additional licenses in accordance with Section 10158 through officers other than the officer designated pursuant to Section 10211 may, by appropriate resolution of its board of directors, assign supervisory responsibility over salespersons licensed to the corporation to its broker-officers.

Cal. Bus. & Prof. Code § 10159.2(b).

5/ Section 10211 of the California Business and Professions Code provides:

> If the licensee is a corporation, the license issued to it entitles one officer thereof, on behalf of the corporation, to engage in the business of real estate broker without the payment of any further fee, such officer to be designated in the application of the corporation for a license. For

California Business and Professional Code explicitly provides that "[e]ach officer of a corporation through whom it is licensed to act as a real estate broker *is, while so employed under such license, a licensed real estate broker*, but licensed only to act as such for and on behalf of the corporation as officer." Cal. Bus. & Prof. Code § 10159 (emphasis added).

Petitioner's undisputed status as Triad's designated broker-officer gave rise to a duty to supervise the salespersons of the corporation. California real estate law makes clear that a designated broker-officer who violates his affirmative duty to supervise the activities of the corporation's salespersons is engaging in misconduct. Specifically, a designated broker-officer who fails to fulfill his affirmative duty to supervise the activities of the corporation's salespersons engages in "willful" disregard of the Real Estate Law in violation of Business and Professions Code § 10177(d), which is grounds for suspension or revocation of his license. *Nelson v. Dep't of Real Estate*,

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> each officer other than the officer so designated, through whom it engages in the business of real estate broker, the appropriate original or renewal fee is to be paid in addition to the fee paid by the corporation.

Cal. Bus. & Prof. Code § 10211.

Section 10158 provides:

> When a real estate license is issued to a corporation, if it desires any of its officers other than the officer designated by it pursuant to Section 10211 to act under its license as a real estate broker, it shall procure an additional license to so employ each of such additional officers.

Cal. Bus. & Prof. Code § 10158.

161 Cal. App. 3d 939, 941-42 & n.3 (1984). California law provides that a broker's license may be suspended or revoked "[i]f, as a broker licensee, [he] failed to exercise reasonable supervision over the activities of his salespersons; or, as the officer designated by a corporate broker licensee, [he] failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required." Cal. Bus. & Prof. Code § 10177(h); *see also id.* § 10159.2(a) (requiring designated broker-officer to supervise "salespersons licensed to the corporation in the performance of acts for which a real estate license is required").[6]

This duty of supervision plainly encompasses an obligation to prevent housing discrimination. California's regulatory regime evinces a clear commitment to state and federal fair housing laws. California law itself makes it unlawful "[f]or any person or other organization or entity whose business involves real estate-related transactions to discriminate against any person in making available a transaction, or in the terms and conditions of a transaction, because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry,

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6/ California is far from alone in requiring the designated broker-officer of a real estate corporation to supervise sales agents. Such supervision requirements are extremely common. *E.g.*, Ala. Code § 34-27-34; Alaska Admin. Code tit. 12, § 64.125; Ariz. Rev. Stat. Ann. § 32-2153(A)(21); Colo. Rev. Stat. § 12-61-103(7)(a); Ga. Code Ann. § 43-40-18(c); Idaho Code § 54-2038; Kan. Stat. Ann. § 58-3060(b); Ky. Rev. Stat. Ann. § 324.160(6); Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(27); Me. Rev. Stat. Ann. tit. 32, § 13067(I)(3); N.H. Rev. Stat. Ann. § 331-A:16(I), (II); N.C. Stat. Ann. § 93A-2(a)-(b); Ohio Admin. Code § 1301:5-1-14; Okla. Stat. tit. 59, § 858-310; Or. Rev. Stat. § 696.301(29); 49 Pa. Code § 35.244; R.I. Code R. 02 040 012, Rule 4; S.C. Code Ann. § 40-57-135; S.D. Codified Laws § 36-46.1(3); Utah Code Ann. § 61-2-11(14); 18 Va. Admin. Code § 135-20-160; Wash. Admin. Code § 308-124D-061; Wyo. Stat. Ann. § 33-28-111(a)(ix).

source of income, familial status, or disability." Cal. Gov. Code § 12955.

Moreover, the California Code of Regulation requires brokers to secure the compliance of their salespersons. "A broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes . . . the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage . . . [f]amiliarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination." Cal. Admin. Code tit. 10, § 2725(f). Thus, the broker-officer has an affirmative legal duty to establish rigorous procedures and policies requiring her salespersons to comply with the Fair Housing Act. Unlike ordinary corporate officers, designated broker-officers are in a position of unique professional responsibility when it comes to anti-discrimination laws.

The Ninth Circuit's decision is fully consistent with that responsibility. The court of appeals explicitly relied on Petitioner's status as Triad's designated broker-officer as a basis for liability. JA 67-71. Specifically, it noted that under California law, a designated broker-officer of a real estate corporation is "responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees in the performance of acts for which a real estate license is required." JA 67. If Petitioner breached that duty of supervision, the Ninth Circuit concluded, "then he should be held accountable for such an omission even absent direct involvement or authorization of Crank's alleged discriminatory conduct." JA 70. Although the Ninth Circuit reasoned that these duties placed Petitioner "squarely within [the Department of Housing and Urban Development's] regulatory history allowing complaints against any person who

has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling," JA 69, the viability of that regulation is not necessary for liability. The Fair Housing Act places no limitation on the class of potential defendants; it reaches *"any person* or entity whose business includes engaging in real estate-related transactions." 42 U.S.C. § 3606 (emphasis added). Petitioner argues that the plain language of the Act should be constrained by the limited liability principles of corporate law. But even if limited liability principles would shield "innocent" officers and shareholders, Petitioner still is potentially liable as the designated broker with a duty to supervise the Triad salespersons' compliance with the FHA.

II. HOLDING DESIGNATED BROKERS LIABLE FOR FAILING REASONABLY TO SUPERVISE IS NECESSARY FOR EFFECTIVE ENFORCEMENT OF THE FHA.

There are solid policy reasons for holding broker-officers responsible for the acts of the corporation's sales agents. It is plain both that sales agents should be properly supervised and that a corporation cannot itself engage in such supervision, but must act through an individual.[7] The designated broker-officer

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7/ As aptly stated in the legislative history of Sections 10177 and 10159:

> Under the terms of the law, real estate brokers are responsible for supervising the activities of their salespersons and employees. The corporate licensee, as a broker, has a similar responsibility, which it cannot fulfill. A paper entity cannot supervise . . . . The granting of the corporate license is predicated upon the qualifications of the designated officer in the first place. It is no injustice to demand that the person standing for

is the person required by many state laws to fulfill that obligation. *Supra*, note 6. As a licensed professional, a real estate broker has unique knowledge and training, and as the individual whose professional status makes the licensing of the corporation possible, he is in a special position of authority. Cal. Bus. & Prof. Code § 10153.2 (requiring brokers to have completed courses in real estate practice, law, financing, appraisal, and accounting); *id.* § 10211 (providing that real estate corporation must name a designated broker-officer); *id.* § 10159.2 (placing responsibility of supervising corporation's employees on designated broker-officer).

Moreover, the possibility of liability for failure properly to supervise sales agents provides the broker-officer with a personal financial incentive to meet his supervision obligations. In the absence of such an incentive, a designated broker-officer could evade the requirements of the Fair Housing Act by neglecting adequately to supervise his sales agents. A suit for damages brought by the victims of housing discrimination would reach the corporation and the sales agent, but might leave untouched the one individual with both the ability and the duty to prevent the discrimination: the designated broker-officer. The California Real Estate Law "attempts to insure licensed supervision of real estate corporation activity by holding designated officers personally responsible for [salesperson] supervision. In this way, holders of brokers licenses will be discouraged from lending their names to arrangements in which they will play the role of 'absentee' designated broker." Senate Comm. on Business & Professions,

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the corporation at licensing continue to stand for the corporation. That is an implicit assumption of the law anyway.

Real Estate Corporate Licenses, supra.

Staff Analysis of AB 985 (Hannigan) as Amended May 3, 1979, at 2 (July 11, 1979).

In addition, the duty properly to supervise agents working under the corporate license, and the potential liability for failing to do so, is an obligation incurred in return for the privilege of conducting business as a corporation. As Petitioner and his *amici* recognize, incorporating a real estate business as a corporation offers innumerable benefits. Pet. Br. 32; NAR Br. 13; CAR Br. 14-15. But California law requires, as a price of using the corporate form, that a real estate corporation designate an individual as the broker-officer and that that individual accept responsibility for supervising other agents of the corporation. Cal. Bus. & Prof. Code §§ 10211, 10159.2(a). Potential liability for lapses in supervision is the price for the privilege of using the corporate form. *Cf. Real Estate Corporate Licenses, supra* (noting that state's grant of corporate licenses is predicated on oversight of corporation's activities by licensed professional individual). Petitioner's position would permit a broker to shield himself from Fair Housing Act liability and any meaningful duty to supervise salespersons working under his license by operating as a corporation. This would have perverse consequences under most state real estate laws in that the corporate form would shield the designated broker from FHA liability but no other type of liability for negligent supervision. Given the expression of public interest in securing fair housing as embodied in the Fair Housing Act and the substantially equivalent laws of numerous states, this should not be the law.

III. THE NINTH CIRCUIT DECISION LEAVES TRADITIONAL PRINCIPLES OF LIMITED LIABILITY INTACT.

The decision below will not result in the parade of horribles – a flood of litigation, the imposition of strict liability on innocent officers and shareholders, the demise of the corporate form in the real estate industry – that Petitioner and his supporting *amici* describe. As an initial matter, it is not unusual for a licensing agency to punish both a real estate corporation and its designated broker-officer for the corporation's wrongdoing. Thus, in discussing entity licensing, a well-known commentator has noted:

> A more genuine concern is the personal liability of the designated broker. For instance, it is often thought that if an individual (Jane Jones) incorporates herself as Jane Jones, Inc., it may shield her from personal liability for torts and contracts of the brokerage corporation. The more logical theory seems to be that if the corporation condones the conduct, the licensing agency will attempt to pursue both licensees rather than let a broker hide behind a corporate veil for breach of fiduciary duty . . . .

Rohan, *supra*, § 6.03[7], at 6-17; *see also id.* § 9.04[3], at 9-31 ("[R]eal estate brokers should exercise caution regarding the actions of their subordinates because under the Fair Housing Act a corporation *and its officers* are responsible for the acts of a subordinate employee, *even if the acts were neither directed*

nor authorized.") (emphasis added).[8] Thus, subjecting a broker-officer to personal liability where he has violated a statutory duty to supervise a sales agent who engages in discrimination is hardly a break with prior practice.

Moreover, the Ninth Circuit did not shred the corporate veil. The court held that a designated broker-officer could be liable for his own failure reasonably to supervise his corporation's sales agents. JA 71. Rather than imposing strict liability, the decision below corrects the district court's grant of absolute immunity – immunity that renders the professional responsibilities of designated broker-officers entirely without substance.

Understood as a matter of professional responsibility, the decision below in no way creates so broad a class of defendants as Petitioner claims. Petitioner was the sole shareholder, president, and designated broker-officer of Triad, a small real estate brokerage firm. But rather than discuss why an

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8/ Moreover, a number of states hold broker-officers responsible for acts of the corporation or sales agents. *E.g.*, Ala. Code § 34-27-34 ("A qualifying broker shall be held responsible to the commission and to the public for all acts governed by this chapter of each salesperson and associate broker licensed under him or her and of each company for which he or she is the qualifying broker."); 49 Pa. Code § 35.201 (providing that the "broker of record" of a corporation is "[t]he individual broker responsible for the real estate transactions of a . . . corporation"); *Kimball Bridge Road at Big Creek v. Everest Realty Corp.*, 234 S.E.2d 673, 675-76 (Ga. Ct. App. 1977) (concluding complaint was sufficient to state a claim against the defendant individually where he admitted to being the qualifying broker for the defendant realty corporation and in charge of the office, even though he claimed that he had no involvement in the transaction at issue); *Circle T Corp. v. Deerfield*, 444 P.2d 404, 407-08 (Colo. 1968) (holding designated broker of Colorado corporation personally liable for corporation's breach of fiduciary duty).

individual in Petitioner's position of authority should be allowed to divest himself of his professional responsibilities, Petitioner and his supporting *amici* invoke a range of hypothetical defendants as the reason why the decision below cannot be sustained. For example, the National Association of Home Builders contends that the decision below will discourage small investors from placing their funds in Real Estate Investment Trusts for fear that they will be held vicariously liable for the wrongful acts of others. NAHB Br. 12.

In fact, the Ninth Circuit's decision does *not* suggest that every officer or shareholder in a real estate corporation is liable for the actions of a rogue sales agent. Rather, it reaffirms the unremarkable proposition that a real estate corporation's designated broker-officer is liable for violations of the Fair Housing Act committed by the corporation's sales agent where the broker's statutory duty of supervision makes him the principal of the agent or where he fails adequately to supervise that agent. The challenged decision makes liable only those whose responsibility it is to ensure compliance with the FHA.

As sole shareholder, president, and particularly as designated broker-officer of Triad, Petitioner was the person within the corporation on whom regulatory responsibility rested. As a professional charged with the oversight of his subordinates' compliance with the Fair Housing Act, Petitioner could no more turn that duty over to those very subordinates than could an attorney delegate her ethical responsibilities to her staff. Because of the professional responsibilities that being the designated broker-officer carries, liability does not attach simply because Petitioner *might* or *could* have exercised some supervision over the primary offender in this case; rather, as the designated broker he *must* oversee compliance with the FHA.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

BRUCE V. SPIVA
Counsel of Record
JESSIE K. LIU
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for *Amicus Curiae*
International Association of
Official Human Rights Agencies

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